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Felcra Bhd v Adli Sharidan bin Sahar & Ors

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-425–07 OF 2018
SU TIANG JOO J
24 JUNE 2024

C *Partnership — Liabilities of partners — Debt — Whether partners of law firm were jointly and severally liable to pay plaintiff monies that firm had received on plaintiff's behalf — Whether salaried partner ('SP') who newly joined firm but never handled plaintiff's files was as liable as the other existing partners — Partnership Act 1961 — Whether truly culpable partners of firm had to*
D *indemnify SP for the damages she had to pay plaintiff — Whether law firm's office and marketing manager who was not a lawyer but had held himself out as partner of firm was as equally liable as the other partners*

E The first four defendants in this case ('D1', 'D2', 'D3' and 'D4') were advocates and solicitors. The fifth and sixth defendants ('D5' and 'D6') were law firms whilst the seventh defendant ('D7') — who was D2's husband — was the office and marketing manager of D6 but held himself out as a partner of the firm even though he was not a lawyer. The plaintiff had built houses in a project ('the project') and in November 2011 appointed D5 to handle the sale and
F purchase agreements, including the loan transactions connected therewith, for the project. At that juncture, D1 and D2 were the only lawyers in D5. In June 2014, D6 notified the plaintiff that it had wholly taken over the files and business of D5 with effect from June 2013. D6's letterhead showed that D2 and D3 were its partners and the firm's profile not only stated that D6 was
G formerly known as D5 but listed D7 as a partner of the firm. By late 2014, the plaintiff had completed the project and delivered vacant possession of the new houses to buyers. Between 2015 and 2017, the plaintiff sought from D6 an account and release of all purchase monies it had collected from buyers but received no response thereto. The plaintiff claimed that out of a total sum of
H RM8,383,551.54 that was owing to jointly by D5 and D6, D5 had only paid RM901,826 whilst D6 had only remitted RM781,396.20 from D6. As its demands for payment of the balance amount owing went unheeded, the plaintiff terminated D6's services and instructed a new firm of solicitors ('ARP') to take over the project's files from D6. D2 undertook to hand over all
I files and the monies it had received on the plaintiff's behalf to ARP but never did so. The plaintiff lodged reports with the police and the Bar Council against the defendants and filed the instant action to recover the monies due to it together with aggravated and exemplary damages, interest and costs on an indemnity basis on the ground that the defendants had committed breaches of

contract and trust and negligence. D1's defence to the plaintiff's claim was a bare denial, contending that he was never involved in the project. D4 contended that she should not be held liable as she joined D6 as a salaried partner on 19 January 2017 and never dealt with the plaintiff's project files. She also claimed that by the time she joined D6, the monies that D2 had collected through D5 and D6 in relation to the project were no longer in D6's bank account. D4 applied to be fully indemnified by D2 and D3 in the event she was found liable to the plaintiff in the instant action.

Held, allowing the plaintiff's claim and ordering: (a) all the defendants to jointly and severally pay the plaintiff RM7,157,869.54; (b) all the defendants except D1 and D5 to jointly and severally pay the plaintiff RM1,225,682; (c) all the defendants except D4 to jointly and severally pay the plaintiff RM715,787 as exemplary damages; (d) all the aforesaid three amounts to carry interest at 5% per annum from date of filing of the writ until one day before date of judgment and thereafter to bear the statutory interest rate until date of full realisation; (e) all defendants to pay the plaintiff costs on an indemnity basis (as assessed); and (f) D2 and D3 to fully indemnify D4 in respect of all monies she had to pay the plaintiff under this judgment:

(1) The plaintiff had proven its case against the defendants on balance of probabilities. Out of the total sum of RM8,383,551.54 claimed by the plaintiff, RM1,225,682 comprised the total amount of loan monies D6 ought to have received from the financier (BSN) consequent upon the transfer to the buyers of 15 houses and the registration of the charges on those properties in favour of BSN. D6 was negligent in not ensuring that the said loan amount was disbursed after completion of the transfers and charges. Since the charges were done etween 20 October 2016 and 8 May 2017, D4 (who became a partner of D6 from 19 January 2017) was also liable for the negligence together with the other partners of D6. Since D1 and D5 had ceased to be involved in the project, they were not accountable for the said negligence. Accordingly, except for D1 and D5, the remaining defendants were jointly and severally liable to pay the plaintiff the said sum of RM1,225,682 (see paras 51, 127–128 & 135).

(2) Even if the sum of RM1,225,682 was not taken into account, there remained a huge sum of RM7,157,869.54 (RM8,383,551.54 less RM1,225,682) that was not accounted for. The logical inference was that this sum had been misapplied by the defendants, save for D4. This fell into the second category of cases where exemplary damages could be awarded as decided in *Rookes v Barnard* [1964] AC 1129. The instant case was not a mere breach of contract but involved breach of trust and confidence reposed in the defendants and the plaintiff having been defrauded of the monies due to it. An award of exemplary damages was called for, and a sum of RM715,787 was awarded for this purpose. D4 was exempted from paying exemplary damages as the evidence showed

A that she had no control over the accounts of D6 and was not personally involved in the project (see paras 136 & 140–141).

(3) In view of the breach of trust and confidence that had occurred, it was apt that the defendants paid the plaintiff costs on an indemnity basis. For holding himself out as a partner of D6, D7 was liable to the plaintiff as a partner of the firm and also to pay costs on an indemnity basis (see paras 104 & 142).

(4) D2 and D3 did not contest D4's claim against them for full indemnity in the event she was found liable to the plaintiff in this action. The indemnity claim was allowed as D2 and D3, who were the only other partners in D6 and who had full control of the files pertaining to the project, had held D4 out as a partner of the firm even though she had not carried out any work on the project files and had no knowledge of matters pertaining to the project (see paras 145–146).

(5) Although D4's defence was that she was not liable as she joined D6 as a salaried partner on 19 January 2017 and had nothing to do with the plaintiff's files, the law as it stood held that she was liable along with the other partners in D6 for the firm's breach of its 26 October 2017 letter of undertaking to the plaintiff's new solicitors, ARP. As D4 was held out as a partner of D6, and there was no notice to the plaintiff that she was in fact not a partner, her assertion that she had no dealings with the plaintiff was irrelevant. Sections 7, 8 and 10–14 of the Partnership Act 1961 applied to make her jointly and severally liable to the plaintiff along with the other partners of D6 (see paras 84–85, 88, 95 & 97).

(6) D1's defence that he, and by extension D5, was not aware of the project was incredible and a barefaced lie and flew in the face of evidence of the work he and his firm had done for the plaintiff and the monies they had collected and paid to the plaintiff in connection with the project. D1 and D5 were the plaintiff's solicitors for the project and were in a position of trust and confidence to account to the plaintiff for the monies they had, or ought to have received, for the plaintiff's benefit (see paras 37, 44 & 47).

(7) In a High Court suit filed in 2020 by D2, D3 and D7 against the plaintiff for, inter alia, legal fees for their handling of the project, the three pleaded that they had received a total sum of RM6,715,653 from cash purchasers and by way of loans from the end-financier, BSN. This was a judicial admission which D2, D3 and D7 could not be allowed to resile from. Thereafter, it was recorded in the minutes of the meeting held on 2 October 2016 attended by D2 and D7 on behalf of D6 that D6 had collected RM8,557,854 from 230 purchasers who had either paid cash or the difference between their housing loans and the purchase price. The collection of this sum by D6 was affirmed by the plaintiff's legal advisor,

PW5, in her witness statement. However, as at the date of that meeting on 2 October 2016, D6's principal bank account for the project recorded a balance of a mere RM110,000. D2 and D3 had utterly failed to account for the monies they had received on the plaintiff's behalf which were inexplicably missing from D6's account (see paras 30–31, 33 & 54–55).

[Bahasa Malaysia summary

Empat defendan dalam kes ini ('D1', 'D2', 'D3' dan 'D4') adalah peguam bela dan peguamcara. Defendan kelima dan keenam ('D5' dan 'D6') adalah firma guaman manakala defendan ketujuh ('D7') — yang merupakan suami D2 — adalah pengurus firma dan pemasaran D6 tetapi menganggap dirinya sebagai rakan kongsi firma walaupun dia bukan seorang peguam. Plaintif telah membuat pembinaan rumah dalam sebuah projek ('projek tersebut') dan pada November 2011 melantik D5 untuk mengendalikan perjanjian jual beli termasuk urus niaga pinjaman yang berkaitan dengan projek tersebut. Pada ketika itu, D1 dan D2 adalah satu-satunya peguam dalam firma D5. Pada bulan Jun 2014, D6 memberitahu plaintif bahawa dia telah mengambil alih sepenuhnya fail dan perniagaan D5 berkuat kuasa Jun 2013. Kepala surat D6 menunjukkan bahawa D2 dan D3 adalah rakan kongsinya dan profil firma itu bukan sahaja menyatakan bahawa firma D6 dahulunya dikenali sebagai firma D5 tetapi menyenaraikan D7 sebagai rakan kongsi firma itu. Menjelang akhir 2014, plaintif telah menyiapkan projek itu dan menyerahkan pemilikan kosong rumah baru kepada pembeli. Antara 2015 dan 2017, plaintif meminta akaun dan pelepasan semua wang pembelian yang telah dikumpulkan daripada pembeli dari firma D6 namun tidak menerima jawapan daripadanya. Plaintif mendakwa bahawa dari jumlah RM8,383,551.54 yang terhutang bersama oleh D5 dan D6, D5 hanya membayar wang sebanyak RM901,826 manakala D6 hanya membayar sebanyak RM781,396.20 daripada D6. Oleh kerana permintaannya untuk pembayaran jumlah baki yang terhutang tidak dihiraukan, plaintif menamatkan perkhidmatan D6 dan mengarahkan firma peguam cara baru ('ARP') untuk mengambil alih fail projek itu dari D6. D2 berjanji untuk menyerahkan semua fail dan wang yang diterimanya bagi pihak plaintif kepada ARP tetapi tidak pernah berbuat demikian. Plaintif membuat laporan kepada polis dan Majlis Peguam terhadap defendan dan memfailkan tindakan ini untuk mendapatkan semula wang yang perlu dibayar bersama-sama dengan ganti rugi, faedah dan kos yang teruk dan teladan atas dasar ganti rugi atas alasan bahawa defendan-defendan telah melakukan pelanggaran kontrak, amanah dan kecuaian. Pembelaan D1 terhadap tuntutan plaintif adalah penafian kosong dengan alasan bahawa dia tidak pernah terlibat dalam projek itu. D4 menghujahkan bahawa dia tidak sepatutnya dipertanggungjawabkan kerana menyertai D6 sebagai rakan kongsi bergaji pada 19 Januari 2017 dan tidak pernah berurusan dengan fail projek plaintif. Dia juga mendakwa bahawa pada masa dia menyertai D6, wang yang dikumpulkan oleh D2 melalui D5 dan D6 mengenai projek tersebut tidak lagi berada dalam akaun bank D6. D4 memohon untuk ganti rugi sepenuhnya

oleh D2 dan D3 sekiranya didapati bertanggunggan kepada plaintif dalam tindakan ini.

Diputuskan, membenarkan tunturan plaintif dan memerintahkan: (a) kesemua defendan bersesama dan berasingan membayar plaintif jumlah sebanyak RM7,157,869.54; (b) kesemua defendan kecuali D1 dan D5 bersesama dan berasingan membayar plaintif jumlah sebanyak RM1,225,682; (c) kesemua defendan kecuali D4 bersesama dan berasingan membayar plaintif jumlah sebanyak RM715,787 sebagai gantirugi teladan; (d) ketiga-tiga jumlah tersebut dikenakan faedah sebanyak 5% setahun dari tarikh pemfailan writ saman sehingga satu hari sebelum penghakiman dan kemudiannya dikenakan faedah statutori sehingga tarikh penyelesaian; (e) kesemua defendan membayar plaintif kos imdemniti (seperti yang dinilai); dan (f) D2 dan D3 untuk membayar D4 sebagai imdemniti untuk kesemua wang yang dibayar kepada plaintif di dalam penghakiman ini:

(1) Plaintif telah membuktikan kesnya terhadap defendan berdasarkan keseimbangan kebarangkalian. Daripada jumlah sebanyak RM8,383,551.54 yang dituntut oleh plaintif, RM1,225,682 adalah dari jumlah wang pinjaman yang sepatutnya diterima oleh D6 daripada pembiaya (BSN) berikutan pemindahan kepada pembeli untuk 15 rumah dan pendaftaran cagaran ke atas hartanah tersebut yang memihak kepada BSN. D6 telah cuai kerana tidak memastikan jumlah pinjaman tersebut dikeluarkan selepas selesai urusan pemindahan dan cagaran. Memandangkan cagaran dilakukan pada 20 Oktober 2016 dan 8 Mei 2017, D4 (yang menjadi rakan kongsi D6 dari 19 Januari 2017) juga bertanggungjawab atas kecuaian itu bersama-sama dengan rakan kongsi D6 yang lain. Oleh kerana D1 dan D5 tidak lagi terlibat dalam projek itu, mereka tidak bertanggungjawab atas kecuaian tersebut. Sehubungan itu, kecuali D1 dan D5, defendan-defendan yang lain bertanggunggan secara bersesama dan berasingan untuk membayar plaintif jumlah sebanyak RM1,225,682 tersebut (lihat perenggan 51, 127–128 & 135).

(2) Walaupun jumlah sebanyak RM1,225,682 tidak diambil kira, masih terdapat sejumlah besar sebanyak RM7,157,869.54 (RM8,383,551.54 tolak RM1,225,682) yang tidak diambil kira. Kesimpulan logiknya adalah jumlah ini telah disalahgunakan oleh defendan, kecuali D4. Ini termasuk dalam kategori kedua kes di mana ganti rugi teladan boleh diberikan seperti yang diputuskan dalam kes *Rookes v Barnard* [1964] AC 1129. Kes ini bukanlah semata-mata pelanggaran kontrak tetapi melibatkan pecah amanah dan keyakinan yang diletakkan kepada defendan-defendan dan plaintif telah ditipu wang yang sepatutnya diperoleh. Ganti rugi teladan dan sejumlah wang sebanyak RM715,787 telah diberikan untuk tujuan ini. D4 dikecualikan daripada membayar ganti rugi teladan kerana bukti menunjukkan bahawa dia tidak

mempunyai kawalan ke atas akaun D6 dan tidak terlibat secara peribadi dalam projek tersebut (lihat perenggan 136 & 140–141).

(3) Memandangkan pecah amanah dan kehilangan keyakinan telah berlaku, adalah wajar untuk defendan-defendan membayar kos plaintif atas dasar indemniti. D7 menganggap dirinya sebagai rakan kongsi fimra D6, maka D7 bertanggungjawab kepada plaintif sebagai rakan kongsi firma dan harus membayar kos atas dasar indemniti (lihat perenggan 104 & 142).

(4) D2 dan D3 tidak mempertikaikan tuntutan D4 terhadap mereka untuk ganti rugi penuh sekiranya didapati bertanggungjawab kepada plaintif dalam tindakan ini. Tuntutan ganti rugi dibenarkan kerana D2 dan D3 merupakan satu-satunya rakan kongsi lain dalam firma D6 dan juga mempunyai kawalan penuh ke atas fail yang berkaitan dengan projek tersebut dan telah menganggap D4 sebagai rakan kongsi firma itu walaupun dia tidak menjalankan sebarang kerja dalam projek tersebut dan tidak mempunyai pengetahuan tentang perkara yang berkaitan dengan projek tersebut (lihat perenggan 145–146).

(5) Walaupun pembelaan D4 adalah bahawa dia tidak bertanggungjawab kerana menyertai D6 sebagai rakan kongsi bergaji pada 19 Januari 2017 dan tiada kaitan dengan fail plaintif, undang-undang sekarang memutuskan bahawa dia bertanggunggan secara bersama dengan rakan kongsi lain di D6 atas pelanggaran firma itu terhadap aku janji bertarikh 26 Oktober 2017 kepada peguam cara baru plaintif iaitu ARP. Oleh kerana D4 dianggap sebagai rakan kongsi D6 dan tiada notis kepada plaintif bahawa dia sebenarnya bukan rakan kongsi, hujahan bahawa dia tidak mempunyai sebarang urusan dengan plaintif adalah tidak relevan. Seksyen 7, 8 dan 10–14 Akta Perkongsian 1961 terpakai untuk menjadikannya bertanggungjawab secara bersesama dan berasingan kepada plaintif bersama-sama dengan rakan kongsi D6 yang lain (lihat perenggan 84–85, 88, 95 & 97).

(6) Pembelaan D1 bahawa dia dan D5 tidak menyedari projek itu adalah luar biasa dan merupakan penafian kosong dan bertentangan dengan keterangan yang menunjukkan kerja yang dilakukan olehnya bersama firmanya untuk plaintif dan wang yang kumpulkan dan dibayar kepada plaintif berkaitan dengan projek tersebut. D1 dan D5 adalah peguam cara plaintif untuk projek tersebut dan diberi kepercayaan dan keyakinan untuk menjawab kepada plaintif untuk wang yang sepatutnya diterima untuk kepentingan plaintif (lihat perenggan 37, 44 & 47).

(7) Dalam saman Mahkamah Tinggi yang difailkan pada 2020 oleh D2, D3 dan D7 terhadap plaintif mengenai, antara lain, yuran guaman bagi pengendalian projek mereka, ketiga-tiga mereka memplidkan bahawa mereka telah menerima wang sebanyak RM6,715,653 daripada pembeli secara tunai dan melalui pinjaman daripada pembiaya akhir, BSN. Ini

adalah pengakuan secara kehakiman yang mana D2, D3 dan D7 tidak boleh menafikannya. Selepas itu, minit mesyuarat pada 2 Oktober 2016 merekodkan bahawa D2 dan D7 telah menghadiri mesyuarat tersebut bagi pihak D6 dan menyatakan bahawa D6 telah mengutip RM8,557,854 daripada 230 pembeli yang sama ada telah membayar tunai atau perbezaan antara pinjaman perumahan mereka dan harga belian. Kutipan jumlah oleh D6 ini telah disahkan oleh penasihat undang-undang plaintif, PW5 dalam pernyataan saksinya. Walau bagaimanapun, pada tarikh mesyuarat bertarikh 2 Oktober 2016, akaun bank utama D6 untuk projek tersebut mencatatkan baki sebanyak RM110,000 sahaja. D2 dan D3 telah gagal sama sekali menjelaskan kehilangan wang yang diterima bagi pihak plaintif dari akaun D6 (lihat perenggan 30–31, 33 & 54–55).]

Cases referred to

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Alan Michael Rosario v Merbok MDF Sdn Bhd [2011] 1 CLJ 433, CA (refd)
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Housing Developers (Control and Licensing) Act 1966
Legal Profession Act 1976 ss 36, 38 s 94(1), (2), (3)
Limitation Act 1953 ss 6, 22(1)
Limited Liability Partnerships Act 2012
National Land Rehabilitation and Consolidation Authority (Succession and Dissolution) Act 1997
Partnership Act 1932 [IN] s 31(2)
Partnership Act 1908 [NZ] s 20(1)
Partnership Act 1890 [UK] ss 14, 17(1)
Partnership Act 1892 [AU] s 14(1)
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Rules of Court 2012 O 11, O 16 r 8, O 18 r 8(1), O 34 r 2(2)(m), O 49, O59 r 6(1), O 77, O 77 rr 2, 5, 7
Solicitors' Account Rules 1990

Shailender Bhar (with him Chia Jia Yee) (Raihan & Shai) for the plaintiff.
Muhammad Afiq bin Ab Aziz (with Muhammad Hanis Nasrullah) (Afiq Aziz & Co) for the first and fifth defendants.
Claudia Cheah Pek Yee (with Tan Pheng Chew and Natasha Neena Yau Hwee Lynn (Pupil in Chambers)) (Skrine) for the fourth and sixth defendants.
Mohd Rafiee bin Noordin (Rafiee & Sani) for the second, third and seventh defendants.

Su Tiang Joo J:

Of equal importance, the public too must be able to depend on the honesty and integrity of all practitioners in the legal profession which plays an indispensable

role in the administration of justice and conduct of matters in law for members of the public (as per Vernon Ong JCA (later FCJ) in *Majlis Peguam v Lim Yin Yin* [2018] MLJU 986 (CA) para [28]).

INTRODUCTION

[1] In undertaking a housing project, the plaintiff entrusted the seven defendants, four of whom were advocates and solicitors, two were law firms and one who was alleged to be held out to be a partner of one of the law firms, to handle the conveyancing aspect including collecting the purchase price and loan sums for its benefit. The plaintiff sued for, inter alia, breach of contract and trust and negligence for the monies which ought to have been received by the defendants and remitted to it, general, aggravated and exemplary damages, interest on the monies and damages together with costs on an indemnity basis. After a trial conducted over 12 days, judgment was pronounced in favour of the plaintiff and these are the grounds for the decision made.

[2] In this judgment, the following issues, which are not free from difficulties, are addressed:

(a) whether an incoming partner should be liable jointly and severally with existing partners to account for monies in a client's or trust account which was opened before the incoming partner joined the law firm but with the client's or trust account continuing to be held under the name of the law firm after the incoming partner has joined the law firm;

(b) whether a retired partner of a law firm should be liable jointly and severally with the existing partners to account for monies in a client's or trust account opened when he was a partner and which were not accounted to the client when he ceased to be a partner of the law firm; and

(c) whether a salaried partner as well as another person who is not an advocate and solicitor but held out to be a partner of a law firm should similarly be liable jointly and severally with the other partners; and

(d) whether a law firm and its partners who are said to have relinquished the firm's files for its client but who continue to receive monies under the name of its law firm ought to be jointly and severally liable to account to the client.

PARTIES

[3] The plaintiff is a statutory body corporate established under the National Land Rehabilitation and Consolidation Authority (Succession and Dissolution) Act 1997. One of its objects is look after the welfare of the settlers'

community and to improve their quality of lives and the future generations that follow.

[4] The first defendant (Adli Sharidan bin Sahar or 'D1'), second defendant (Nurul Adzliana Ainnie bt Abdullah or 'D2'), third defendant (Mohd Irwan Nizam bin Khorizan or 'D3'), fourth defendant (Norazlina Mat Saad or 'D4') were at the material time, advocates and solicitors.

[5] Both D1 and D2 are cousins and the seventh defendant (Nor Azlan bin Md Huri or 'D7') is the husband of D2.

[6] The fifth defendant (Sharidan & Co or 'D5') and the sixth defendant (Adzliana & Partners or 'D6') are law firms.

[7] D7 was the Office and Marketing Manager of D6. He was also the Office and Marketing Manager of D5 and was held out to be a partner of D6 in D6's firm profile even though it is undisputed that he was never an advocate and solicitor.

LEGAL REPRESENTATION OF THE DEFENDANTS

[8] D1 and D5 are represented by Messrs Afiq Aziz & Co. The other defendants, D2, D3, D4, D6 and D7 had initially retained the same set of solicitors, Messrs Skrine. A common defence was put up. However, new solicitors came in to act for them and an amendment to the defences of D2 and D3 as well as that of D4 and D6 were filed. During the trial, the legal representations of seven defendants were as follows:

(a) D1 and D5 by Messrs Afiq Aziz & Co;

(b) D2 and D3 by Messrs Fadhly Yaacob & Co;

(c) D4 and D6 by Messrs Skrine; and

(d) D7 by Messrs Rafiee & Sani.

[9] D7 had been adjudicated a bankrupt but I was informed during the course of trial by learned counsel, Mr Mohd Rafiee bin Noordin, that sanction has been obtained from the Director General of Insolvency for D7 to be represented by him and his law firm of Messrs Rafiee & Sani. Prior to him obtaining sanction, D7 can be seen diligently attending court on the days the trial was conducted.

SALIENT FACTS — THE PROJECT

[10] In early November 2011, the plaintiff undertook a housing project known as Projek Perumahan Kampung Tersusun Generasi Kedua FELCRA Bhd at Seberang Perak, Perak ('the project').

[11] The total sale value of the project was estimated to be about RM24,676,168.

[12] There were three categories of purchasers of the houses being constructed for the project namely:

(a) cash purchasers;

(b) purchasers who took loans from banks, in particular, from Bank Simpanan Nasional Bhd ('BSN'); and

(c) purchasers who took loans from the government through the Lembaga Pinjaman Perumahan Sektor Awam ('LPPSA').

ENGAGEMENT OF THE LAW FIRMS OF D5 FOLLOWED BY D6 FOR THE PROJECT

[13] Evidenced by a letter of appointment dated 2 November 2011 (IDB B1 pp 28–29) carrying the caption 'Surat Lantikan Peguam Untuk Mengendalikan Urusan Jualbeli Unit Rumah Projek Perumahan Kampung Tersusun Generasi Kedua FELCRA Berhad Seberang Perak', D5 was engaged to act for the plaintiff to conduct the sale and purchase transactions for the project. It also acted in the financing transactions where applicable.

D1 — A sole proprietor of D5?

[14] Both D1 and D2 were advocates and solicitors of D5.

[15] If D5 was a sole proprietorship as alleged by D1, this ought to have been made clear in its letterhead as is required by r 3.02(1) of the Rules and Rulings of the Bar Council Malaysia which provides that:

> Sole proprietor/partner
>
> The name of the sole proprietor or every partner in a law firm must be stated on the firm's letterhead.

[16] Indeed, it is also provided that the names the legal assistants in a firm, if stated, must be distinguished from those of the sole proprietor or partners of the firm, see r 3.02(2) of the Rules and Rulings of the Bar Council Malaysia. This rule is reproduced hereunder:

Legal Assistants

(a) The names of the legal assistants in a firm, if stated, must be distinguished from those of the sole proprietor or partners of the firm.

[17] These rules are sensible and helpful as they would assist those having any dealings with a law firm to ascertain who are the principals and who are the employee advocates and solicitors. The letterhead of D5 did not have any feature to distinguish the position of D1 and D2. Instead, from the letters carrying the letterhead of D5, both D1 and D2 were held out to be partners (IDB B1 see for eg pp 30, 32, 33, 35, 36, 38) and a copy of D5's letterhead is reproduced hereunder.

SHARIDAN & CO.
Advocates & Solicitors/Peguambela & Peguamcara
No. 1857,Tingkat 1,Lorong Merbah Indah 1, Taman Merbah Indah, 14300 Nibong Tebal
Seberang Perai Selatan, Pulau Pinang (Tel/Fax : 04-5941181/1182) email: sharidan_co@yahoo.com.my
ADLI SHARIDAN BIN SAHAR
NURUL ADZLIANA AINNIE BT ABDULLAH

[18] That these rules have to be obeyed can be seen from s 94(1), (2) and (3) of the Legal Profession Act 1976 where an advocate and solicitor who is found guilty of misconduct for any breach of rules of practice and etiquette of the profession made by the Bar Council shall be liable to be:

(a) struck off the Roll;

(b) suspended from practice for any period not exceeding five years;

(c) ordered to pay a fine not exceeding fifty thousand ringgit; or

(d) reprimanded or censured.

SUBSEQUENT ENGAGEMENT OF D6

[19] On or about June 2014, the plaintiff was notified by letter dated 27 January 2014 (IDB B1 p 39) under the letterhead of D6 that D5 has handed over the management of all files, finances and administration in its entirety to D6 with effect from 26 June 2013. In its original language, the relevant part of this letter says:

> Untuk makluman pihak tuan/puan Tetuan Sharidan & Co telah menyerahkan pengurusan kepada Tetuan Adzliana & Partners bermula 26/06/2013. Pertukaran tersebut melibatkan semua perkara seperti penyerahan fail-fail yang dikendalikan,

kewangan serta pentadbiran secara keseluruhan.

[20] In this letter by D6 to the plaintiff, the letterhead carries the names of D2 and D3 as its partners. That D2 and D3 practiced in partnership is an agreed fact (encl 122 para 2).

[21] In D6's firm profile (IDB B1 pp 42 to 62 at p 44) it was prominently set out that it was formerly known as D5 which was first established from December 2002 and continued until May 2013, and that with effect from June 2013, D5 has *changed its name*, from Messrs Sharidan & Co to that of Messrs Adzliana & Partners (D6).

THE PLAINTIFF'S CLAIMS

[22] The plaintiff completed the project and delivered vacant possession of the houses constructed to the purchasers in late 2014. Between 2015 to 2017, the plaintiff requested, inquired and demanded from D6 to account and release the purchase price received. These requests were made on multiple occasions. Many of these inquires and demands went unanswered. Only six payments totalling RM1,683,222.20 were released to the plaintiff (IDB B1 pp 101–107, IDB B1 pp 113–116 and IDPT (1) p 39), made up of three payments totalling RM901,826 by D5 and three payments totalling RM781,396.20 by D6.

[23] The payments made by D5 and D6 were helpfully tabulated by the plaintiff in PW5's witness statement (PWS5) in Q&A 15 and supplemented in Q&A 36(a) to (c) and is reproduced here:

Q15. What monies were released to Felcra at that time?

A15. Between 10.7.2012 to 10.5.2013, Sharidan & Co only released the following arbitrary payments to Felcra:

Payment	Sharidan & Co Cover Letter	Public Bank Cheque No	Amount (RM)	Ikatan Dokumen Bersama B
1st	10.7.2012	455491	198,969.00	pg 30–31
2nd	3.1.2013	073896	300,000.00	pg 33–34
3rd	10.5.2013	257421	402,857.00	pg 36–37
Total			RM901,826.00	

Q36. What was the response by Adzliana & Partners to Felcra letters dated 4.5.2016 and 9.5.2016 mentioned above? Was there any release of monies?

A36. Adzliana & Partners did not release RM5,751,174.00 in accordance with their undertaking. Neither did Adzliana & Partners release the monies in relation to PT 8908. Instead, Adzliana & Partners only released a total sum of RM781,396.20 via 3 separate arbitrary payments:

A (a) Vide Public Bank Cheque No 072159 dated 27.6.2016, a payment was made for the amount of RM404,512.20, being the balance purchase price paid by 6 cash purchasers [See: Ikatan Dokumen Bersama B, pg 101–103];

B (b) Vide Public Bank Cheque No 072179 dated 19.8.2016, a payment was made for the amount of RM46,636.20, being the balance purchase price paid by 1 cash purchaser [See: Ikatan Dokumen Bersama B, pg 104–107];

C (c) Vide Public Bank Cheque No 353393 dated 13.4.2017, a payment was made for the amount of RM330,247.80, being the balance purchase price paid by 5 cash purchasers [See: Ikatan Dokumen Bersama B, pg 113–116 and Ikatan Dokumen Tambahan Plaintif (1), pg 39]

This 3rd payment was only made after Felcra had discovered that the titles of another 5 houses had been transferred to the purchasers upon conducting its own land searches and thereafter, made inquiries to Adzliana & Partners for the release of full purchase price via letter dated 29.3.2017 [See: Ikatan Dokumen Bersama B, pg 109–110].

D

[24] Undoubtedly disappointed and upset, the plaintiff terminated the services of D6. A new set of solicitors, Messrs Abdul Rahman & Partners, was E appointed to take over the conduct of the project. They contacted D6. By letter dated 26 October 2017 (IDB B1 p 217) to the new set of solicitors, D2 on behalf of D6 said, inter alia:

For your information, we are still checking the amount of client's monies held in our account. We undertake to forward to you the details and how it will be transfer (sic) F to your account before the last date to transfer the files.

[25] In breach of its undertaking, D6 did not provide the details.

G **[26]** Instead, the plaintiff had to suffer the gross inconvenience of reconstructing the financials on the monies received by D5 and D6. This, it did from documents obtained from D6 and various other sources including the purchasers, BSN, the Bar Council, and the police, who upon a report lodged, had seized files from D6.

H

[27] After reconstructing the financials, the following evidence were produced through PW5:

Q61. Please refer to pg 11–98 of Ikatan Dokumen Bersama B2. Can you tell us what is this document?

I

A61. This is a document that was produced by Adzliana in the Advocates & Solicitors Disciplinary Board proceedings. It shows a letter dated 14.12.2018 from Public Bank to Skrine enclosing Adzliana & Partners Bank Statements for Account No 3189063434 from April 2014 to November 2018. The Bank Statements correspond with the list given by BSN to Felcra, in that it shows a total

of 19 BSN loans had been disbursed to Adzliana & Partners. The Bank Statements also show the exact amount of loan sum (without insurance) received by Adzliana & Partners from Unit Kredit Perak BSN — RM1,346,324.00 in total. Each individual transaction for the 19 BSN loans can be found at the following page:

No	Page No	Date	IMEPS (last 8 digits)	Amount (RM)
1	56	29.6.2016	17171894	103,980.00
2	56	30.6.2016	17929138	103,980.00
3	57	1.7.2016	18897007	103,900.00
4	57	1.7.2016	18897008	103,989.00
5	61–62	20.9.2016	13853765	46,636.00
6	62	20.9.2016	13853766	76,360.00
7	64	12.10.2016	18438295	76,360.00
8	64	18.10.2016	10668775	76,300.00
9	68	27.12.2016	15162782	76,300.00
10	69–70	23.1.2017	19493701	76,300.00
11	74	2.3.2017	13042022	46,600.00
12	74	7.3.2017	15670518	46,600.00
13	77	12.4.2017	16266036	103,900.00
14	77	14.4.2017	17347266	46,600.00
15	77	14.4.2017	17347265	72,119.00
16	77	19.4.2017	19183158	46,600.00
17	79	11.5.2017	11074044	46,600.00
18	79	19.5.2017	15446588	46,600.00
19	79	24.5.2017	17457536	46,600.00
TOTAL				RM1,346,324.00

Q62. What is the total differential price that Sharidan & Co and/or Adzliana & Partners received for these 19 houses?

A62. Since the loans had been disbursed by BSN, Sharidan & Co and/or Adzliana & Partners must have received or ought to have received full differential price for these 19 houses from the purchasers. The total sum is RM185,714.00.

Total purchase price for 19 houses: RM1,532,038.00

(–)19 BSN loans disbursed to Adzliana & Partners: RM1,346,324.00

Total differential price RM 185,714.00

Q73. What is the total sum of the 15 houses that ought to have been received by Defendants?

A73. Since the houses had been transferred and charged, the total sum that ought to have been received by Defendants is RM1,225,682.00 ie the full purchase price of all 15 houses. Felcra is also claiming this amount. I have prepared a table consisting the breakdown of these 15 houses, and attach it at 'ATTACHMENT A' at the back of my Witness Statement.

Q78. What is the total purchase price received by Sharidan & Co and/or Adzliana & Partners from these 96 cash purchasers?

A78. The total purchase price received by Sharidan & Co and/or Adzliana & Partners from the 96 cash purchasers is RM6,075,806.70. Felcra is claiming this amount as well.

The breakdown of the payment made by each cash purchaser to Sharidan & Co and/or Adzliana & Partners can be found at 'ATTACHMENT B', which I have prepared and attached it as part of my Witness Statement.

I would also like to state that the advice given by Adzliana & Partners vide their letter dated 7.8.2017 to Felcra's new solicitors was incorrect. In the annexure to the letter, they advised that there were only 93 cash purchasers [See: Ikatan Dokumen Bersama B2, pg 209–211].

Q81. What is the total differential price received by the Defendants from these 132 BSN purchasers?

A81. The total differential price received by Sharidan & Co and/or Adzliana & Partners from the 132 BSN purchasers is RM1,182,710.84. For the breakdown of the payment received by the Defendants from each BSN purchaser, I have prepared 'ATTACHMENT C' and enclosed it as part of my Witness Statement.

Q83. From the LPPSA documents referred to earlier, what is the initial deposit/booking fees received by Sharidan & Co and/or Adzliana & Partners from these 72 LPPSA purchasers?

A83. The total initial deposit/booking fees and deposit received by Sharidan & Co and/or Adzliana & Partners from the 72 LPPSA purchasers is RM50,536.20. I have prepared a breakdown, listing out the initial deposit/booking fees received by Sharidan & Co and/or Adzliana & Partners, and enclosed it as 'ATTACHMENT D' at the back of my Witness Statement.

[28] From the above evidence led through the legal advisor of the plaintiff, Amirah Kausar bt Basiron ('PW5'), the accounts were put together and set out in Attachments A to D of her witness statement ('PWS5'). After taking into account the aforesaid six payments released by D5 and D6, the total ascertainable losses suffered by the plaintiff was tabulated as follows (PWS5 Q&A 84):

Q84. From the records now available to Felcra and filed in Court, what are the ascertainable losses suffered by Felcra?

A84. Taking into account the 3 payments released by Sharidan & Co and Adzliana & Partners respectively, the total ascertainable losses suffered by Felcra is RM8,383,551.54 with the following breakdown:

Description	Amount (RM)
19 loans disbursed by BSN	1,346,324.00
Differential price for the 19 units	185,714.00

15 units which titles had been transferred and charged but no BSN loan was disbursed	
1,225,682.00	
Purchase price paid by 96 cash purchasers	6,075,806.70
Deposit and differential price paid by 132 BSN purchasers	1,182,710.84
+ Booking fees and deposit paid by 72 LPPSA purchasers	50,536.20
Total losses	10,066,773.74
(Minus)	
3 Payments by Sharidan & Co	(901,826.00)
– 3 Payments by Adzliana & Partners	(781,396.20)
Total received	(1,683,222.20)
Total ascertainable losses of Felcra	RM8,383,551.54

This sum of RM8,383,551.54 is to be paid by the Defendants.

COURT'S ANALYSIS AND FINDINGS

[29] I begin by making an overall analysis of the evidence led by the plaintiff. I will then deal with the defences put up by all the defendants. The latter falls into four groups:

(a) D1 and D5;

(b) D2 and D3;

(c) D4 and D6; and

(d) D7.

Admissions, approbate and reprobate

[30] It is settled law that admissions are the strongest evidence (see *Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740; [1993] CLJU 103; [1993] 1 LNS 103) and admissions in pleadings or judicial admissions stand on a higher footing than evidentiary admissions, and such admissions by themselves can be made the foundation of the rights of the parties, see *Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong) v Superintendent of Lands & Surveys (Miri Division) and others* [2005] 5 MLJ 305; [2005] 3 CLJ 697 (CA) where at paras [47], His Lordship Clement Skinner J speaking for the Court of Appeal said:

> [47] In support of what we say we would refer to Sarkar's *Law of Evidence* at p 313 under the topic 'Admissions in Pleadings' where it is said:
>
> Admissions in pleadings or judicial admissions stand on a higher footing than

A evidentiary admissions. The former are fully binding on the maker and constitutes a waiver of proof whereas the latter are not conclusive and can be shown to be wrong (*Nagindas v Dalpatram* AIR [1974] SC 471). Admissions in pleadings or judicial admissions by themselves can be made the foundation of the rights of the parties (*Satish Mohan Bindal v State of UP* AIR [1986] ALL B 126; 1985 ALL CJ 507.

[31] By way of Kuala Lumpur High Court Civil Suit WA-22NCvC-665–10 of 2020 ('Suit 665'), D2, D3 and D7 had sued the plaintiff for, inter alia, legal fees for handling the project ('Suit 665'). In Suit 665 (IDTP 1 pp 40–55 @ 49 C para 17–19), they pleaded that they have received a sum of RM5,451,118 from cash purchasers and RM1,264,535 in loans from BSN with the total receipt being RM6,715,653. This is a clear admission by D2, D3 and D7.

D **[32]** As the instant action is in the main, one against advocates and solicitors (save for D7 but who is held out to be one), it is appropriate to hearken to the words of our Chief Justice, The Right Honourable Tun Tengku Maimun Tuan Mat in Her Ladyship's decision in *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ E 320; [2021] 8 CLJ 163 at para [36] where Her Ladyship said:

> [36] We pause for a moment here to note that our case law is replete with reminders to advocates — whether from the Bar or public service — of the onerous duties of those in the legal profession. The highest duty of counsel — a duty which supersedes his or her duty to his client — is his duty to the court, which remains F paramount in the administration of justice. Counsel are expected to make out their client's case to the best of their abilities but they cannot adopt the mindset that they must 'win at all costs' if that results in misleading the court or approbating and reprobating before different panels of the court.

G **[33]** D2, D3 and D7 cannot be allowed to resile from such an admission. To allow them to do so would be akin to them approbating and reprobating or blowing hot and cold before different courts, which the court would not countenance. See also *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16 (CA) at H para [105] where the Court of Appeal cited and adopted the following words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd and others* [1990] 3 All ER 376 at pp 383–384:

> I There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitude towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

As against D1 and D5

[34] In summary, D1's defence is one of denial. He denies that he was involved in the project. He asserted that he practiced in D5 as a sole proprietor. D1 sought to rely upon the particulars of the Malaysian Bar's records (IDB A pp 4–7) as conclusive proof that he was practicing as a sole proprietor in D5 for the period from 2006 until 2012. This document was classified as a Part A document, and thus its contents are admitted both as to authenticity and contents, see O 34 r 2(2)(m) of the Rules of Court 2012.

[35] However, the plaintiff led credible evidence to show that D1 and D2 had represented to PW5 that they were practicing as partners of D5 (PWS5 Q&A 5). The evidence led were:

(a) in D5's firm profile for the year 2011 (IDB B1 p 10) it was represented that D5 has two partners, D1 and D2. It will be recalled that D5 was engaged for the project by the plaintiff vide a letter of appointment dated 2 November 2011 (IDB B1 pp 28–29); and

(b) in the Malaysian Bar Professional Indemnity Insurance Certificate for the period 1 January 2011 to 31 December 2011, both D1 and D2 were the named insured and both were said to carry the position of partners of the firm of D5.

[36] Therefore, whilst D5 may in fact be a sole proprietorship — as against the plaintiff, I find that both D1 and D5 are estopped from asserting that it was by reason of the representations made. See *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 (FC) where His Lordship, Gopal Sri Ram JCA (later FCJ) speaking for the Federal Court said:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
>
> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244; [1989] 1 CLJ 693 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.
>
> The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v Gopal Chunder Laha* LR 19 IA 203*; Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222; [1970] CLJU 21; [1970] 1 LNS 21) or the validity of an option in a lease declared by statute to be invalid for want of registration (see *Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting

A that there was no valid and binding contract between him and his opponent (see *Waltons Stores (Interstate) Ltd. v Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see *Spiro v Lintern* [1973] 1 WLR 1002. It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the B *Amalgamated* case (supra)) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co of New York v The Calgary Milling Co Ltd* (1919) 48 DLR 295*; De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330*; Taylor Fashions.*

C **[37]** With respect, D1's defence that he and by extension, D5, is not aware of the project, is incredible and flies in the face of the following evidence led:

(a) the numerous sale and purchase agreements clearly states that the law firm of D5, of which D1 professed to be the sole proprietor, is the firm of D solicitors on record acting for the plaintiff as the vendor;

(b) the numerous letters issued by D5 to the purchasers asking for payments of purchase price and legal fees;

(c) receipts issued by D5 as well as bank-in transaction slips showing E payments into D5's bank account; and

(d) the three payments amounting to RM901,826 paid by D5 to the plaintiff.

F **[38]** In my considered view, adopting the words of His Lordship, Syed Agil Barakbah FCJ (later LP) said in *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 at p 43, these evidence amount to:

... ample evidence on record for the learned judge to conclude that a retainer came into existence by implication and as amplified by the conduct of the parties which G showed a course of dealings giving rise to legal obligations and establishing the relationship of solicitor and client.

[39] D2 in her evidence said that she had informed D1 of the project upon D5 having been appointed to manage it. With the millions of ringgit of H purchase price money flowing into the bank account of D5, I agree with the plaintiff that it is 'most ludicrous' for D1, and by extension, D5, to assert that he (D1) did not authorize D2 to deal with the plaintiff, and that he (D1) as the alleged sole proprietor, has nothing to do with the plaintiff.

I **[40]** There are elaborate rules under, inter alia, the Solicitors' Account Rules 1990, Advocates and Solicitors (Issue of Sijil Annual) Rules 1978, and the Accountant's Report Rules 1990 which imposes upon an advocate and solicitor a duty to pay client's money into a client account, and to declare all accounts he has opened. These accounts have to be audited and an accountant's report put

up before the advocate and solicitor can be issued a Sijil Annual to enable him or her to apply for a practicing certificate.

[41] Therefore, I agree with learned counsel for the plaintiff, regardless of whether D1 is a sole proprietor or a partner of D5, the law casts a duty upon him to ensure the proper management of D5's bank accounts in whichever branch the bank accounts may be opened. In *Law Society of Singapore v Zulkifli bin Mohd Amin and another matter* [2011] 2 SLR 620 which was cited with approval by our Federal Court in *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640 at para [54] the following pertinent findings were made:

> The very fact that Zulkifli was able to abscond with more than $11m showed that Sadique breached his duty as a co-signatory to supervise the client account. Sadique's cavalier attitude towards supervising the firm's accounts facilitated Zulkifli's crime. His argument that he had agreed with Zulkifli to divide responsibilities between themselves and was thus not liable for his failure to supervise the accounts as this task fell under Zulkifli's purview was completely without merit.

[42] D1 sought to distance himself from D5's branch in Nibong Tebal, Penang by asserting that his law practice was only in Kota Bharu, Kelantan and he has nothing to do with the branch in Nibong Tebal in Penang. However, D1 has agreed as a fact that he and D2 were advocates and solicitors practicing in Sharidan & Co (D5) with offices in Nibong Tebal, Penang and Kota Bharu (see agreed facts of D1 in D1 and agreed facts of D2, D3 and D7 in D2). Therefore, his attempt to distance himself from the Nibong Tebal branch in Penang not only sounds hollow but directly contradicts what he had agreed as a fact.

[43] In any event, as held by the Court of Appeal in *Alan Michael Rosario v Merbok MDF Sdn Bhd* [2011] 1 CLJ 433 the allegation that one partner was not an equity partner of another branch and that he had no knowledge of the matter does not absolve him in law of his liability as a partner of the firm.

[44] In the circumstances, I find the assertion by D1 that he has no knowledge of the project to be wholly devoid of merits and in fact, a barefaced lie.

[45] To add insult to injury, D1 asserted that it was for the plaintiff to do its due diligence or 'background check' to ascertain the actual status of the firm. D1 has conveniently or willfully chosen to forget that an advocate and solicitor is a member of the legal profession which is an honourable profession. In *Majlis Peguam v Lim Yin Yin* [2018] MLJU 986 (CA) para [28]) His Lordship, Vernon Ong JCA (later FCJ) pointedly said:

A

> Of equal importance, the public too must be able to depend on the honesty and integrity of all practitioners in the legal profession which plays an indispensable role in the administration of justice and conduct of matters in law for members of the public.

B

[46] So high is the regard accorded to members of the legal profession that under the Evidence Act 1950 ('the EA 1950'), the court is expressly enjoined to take judicial notice that any advocate and solicitor who appears before it is so authorised to appear or act before it, without question, see s 57(m) of the EA 1950. Judicial notice means that no fact of which the court will take judicial notice need be proved, see s 57 of the EA 1950. As was said by His Lordship, Lee Swee Seng JC (now JCA) in *Poh Chee Seng v Majlis Peguam* [2015] 10 MLJ 829 at para [1]:

C

D

> Our word is our bond! In no profession is this more expected of and exacted from than members of the honourable legal profession. Truth and trustworthiness are hallmarks of the profession On them are reposed the trust of clients and third parties where their monies, assets, wealth and rights are concerned ...

[47] I find that D1 and D5 were the plaintiff's solicitors for the project. By reason thereto, they stand in a relationship of trust and confidence with the plaintiff, and must account to the plaintiff the monies it has and ought to have received for the benefit of the plaintiff. See *Wan Rohimi bin Wan Daud dan satu lagi lwn Abdullah bin Che Hassan & 270 Yang Lain dan satu lagi rayuan* [2015] MLJU 2190; [2016] 4 CLJ 125 (CA) where His Lordship, Vernon Ong JCA (later FCJ) at para [28] held:

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> [28] In this case, the incontrovertible fact is that the defendants were acting as solicitors for the plaintiffs in the FELDA suit; the payments were made to defendants in their capacity as solicitors for the plaintiffs. As solicitors for the plaintiffs in the FELDA suit, the defendants stand in a fiduciary relationship of trust and confidence with the plaintiffs. As to the meaning of fiduciary, it is instructive to refer to the instructive passages at pp 744, 745 and 747 of the judgment of the Court of Appeal in *Alcatel-Lucent (Malaysia) Sdn Bhd v Solid Investments Ltd & Another Appeal*.
>
> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary (see: *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698, the English Court of Appeal).
>
> The accepted traditional categories of fiduciary relationship usually arise in matters involving trustee beneficiary, agent-principal, solicitor-client, employee-employer, director-company, and partners' inter se relationships. Unless expressly provided for

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in an agreement commercial transactions falling outside the accepted traditional categories of fiduciary relationship (as in the present case) often do not give rise to fiduciary duties, because they do not meet the criteria for characterisation as fiduciary in nature (see: *John Alexander Clubs*).

From the above authorities, for there to exist a complete cause of action for taking of accounts, the respondent has to plead and prove the following:

(a) the appellant (as the defendant) must be liable to pay a certain sum of monies to the respondent (as the plaintiff); and

(b) the appellant (as the defendant) is an accounting party to the respondent (the plaintiff).

[29] Applying the well-established principles enunciated above, we hold that the defendants qua solicitors for the plaintiffs in the FELDA suit stand in a relationship of trust and confidence with the plaintiffs; accordingly, the defendants are therefore fiduciaries and the payments were received by the defendants in their capacity as fiduciaries for the plaintiffs. Consequently, the defendants are liable to pay the judgment sum to the plaintiffs. As such, the defendants are an accounting party to the plaintiffs.

[48] The plaintiff was notified by letter dated 27 January 2014 (IDB B1 p 39) under the letterhead of D6, that D5 has handed over the management of all files, finances and administration in its entirety to D6 with effect from 26 June 2013. However, in my judgment, until and unless all monies are fully accounted for, the fact that the monies came to be managed by D2 under the law firm of D6, would not exculpate D1 and D5 from their liability to account. This is expressly provided by s 13 of the Partnership Act 1961 Act 135 ('the Partnership Act') which provides that:

Misapplication of money or property received for or in custody of firm

In the following cases, namely —

(a) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and

(b) where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

[49] I derive further support from the judgment of His Lordship, Mohd Hishamudin bin Md Yunus J (later JCA), in *Southern Empire Development Sdn Bhd v Tetuan Shahinuddin & Ranjit & Ors* [2008] MLJU 60; [2008] 5 CLJ 195 (HC) (cited with approval by the Court of Appeal in *Toh Fong Cheng & Ors v Pang Choon Kiat & Ors and another appeal* [2020] MLJU 1476 at para [11] (infra)) who held as follows:

[17] In my judgment, because in law the liability of the firm is distinct from that of the partners, therefore, the liability of the firm is not affected by any partner ceasing to be a partner of the firm. Although the particular errant partner has long left the partnership, the liability of the firm still continues — subject only to any law pertaining to limitation of actions.

[18] This, to my mind, must be the correct interpretation of the law pertaining to partnership; otherwise there will be chaos in the commercial world; for, if the 1st defendant's proposition were to be accepted, then a partnership which has incurred a liability can easily exonerate itself from that liability simply by asking the particular errant partner in question to leave the firm.

Surely, this cannot be the law.

As against D2 and D3

[50] In their submissions filed (E304), D2 and D3 asserted that:

(a) D6 was lawfully appointed by the plaintiff;

(b) each and every instruction given by the plaintiff has been complied with and from the evidence of D2, monies received have been paid to the plaintiff:

(c) the relationship between D6 and the plaintiff started to become strained when D6 issued an invoice for RM1.3m for legal fees which the plaintiff refused to make any payment;

(d) D2 and D3 has used the police and the Malaysian Bar Council to seize all files pertaining to the project on the premise that D6 had failed to hand over monies for the project;

(e) the plaintiff has failed to prove that D2 and D3 as partners of D6 had taken the monies pertaining to the project;

(f) it is settled law that the burden of proof lies on the plaintiff to prove its loss. Reference was made to the case of *Peninsular Home Sdn Bhd v Ko Lim Tristar Sdn Bhd* [2024] 2 MLJ 623; [2024] CLJU 19 (CA) at para [66];

(g) evidence led shows that monies were paid to D5, and thus D2 and D5 as well as the law firm of D6 ought not to be responsible for the monies paid to D5. And, the plaintiff has failed to prove how much was received by D5 and D6;

(h) the minutes of a meeting held on 13 May 2015 between the plaintiff on the project attended by PW5 and D7, did not show any discussion of there being any monies that have not been paid by D6 to the plaintiff;

(i) that the plaintiff has failed to show any negligence on the part of D6;

(j) that D6 at all material time is covered by insurance; and

(k) D2 and D3 have not been charged, let alone, convicted of any criminal charges.

BURDEN OF PROOF

[51] It is true that the legal burden is on the plaintiff to first prove its case that the defendants, and in particular D2, D3 and D6 have to account to it for the monies received pursuant to the project. In my considered view, the plaintiff has discharged this legal burden on a balance of probabilities when it led evidence to prove that:

(a) by letter dated 27 January 2014 (IDB B1 p 39) D6 informed the plaintiff that D6 has taken over from D5 all the files, finances and management of the project commencing 26 June 2013 and by reason thereto a solicitor-client relationship came into being between D2 and D3 as partners of D6 with the plaintiff. And, pursuant to this relationship, D2 and D3, and by extension, D6 each owes a duty to account;

(b) by letter dated 26 October 2017 (IDB B1 p 217) to the new set of solicitors taking over from D6, D2 had on behalf of D6, undertaken to forward to the new solicitors the details of the amount of client's monies held in its account, and how the monies were to be transferred to the account of the new solicitors. D2, D3 and D6 did not make good on this undertaking which in any event, is an obligation imposed upon them as fiduciaries by law. And, this letter is an admission by them that they have to account to the plaintiff;

(c) even after D6 had taken over the management of the files for the project, purchase monies continue to be paid in the name of D5 with receipts issued by D6;

(d) D2 and D3 has in Suit 665 admitted in pleadings that they have received a sum of RM5,451,118 from cash purchasers and RM1,264,535 in loans from BSN with the total receipt being RM6,715,653, but D6 had paid over only a sum of RM781,396.20; and

(e) that 15 units of houses were charged to BSN and the houses transferred to the purchasers but the loans amounting to RM1,225,682 were not released to the plaintiff. D2 and D3 were partners of D6 who were the transactional solicitors for these loans. Thus, it is clear that D2 and D3 were also negligent here when it breached its duty of care owed to the plaintiff by failing to have the loans released to D6 for the benefit of the plaintiff.

[52] It is unfortunate that learned counsel for D2 and D3, whose duty is to the court, have found it fit not to address these pieces of evidence in his submissions. See the admonition by YAA Chief Justice of Malaysia in *Nivesh*

Nair Mohan. Further, the minutes of the meeting of 13 May 2015 was not even challenged by way of cross-examination during the plaintiff's case, and neither was the contents ever put to any of the plaintiff's witnesses. Instead, these minutes were only raised for purposes of the indemnity claim filed by D4 against D2 and D3.

[53] Once the plaintiff has discharged its legal burden, the evidential burden shifts to D2 and D3 to account, see *Randhir Singh a/l Bhajnik Singh v Sunildave Singh Parmar (the administrator of the estate of K Surjit Kaur a/p Gean Kartar Singh, deceased)* [2018] 12 MLJ 166; [2019] 6 CLJ 771 (CA) at para [8]. Unfortunately for the plaintiff, its repeated requests and demands to the defendants yielded no positive response. Even during the trial, D2 who was the main transactional solicitor was evasive when asked about the accounts.

[54] I agree with the plaintiff that D2 and D3 have utterly failed to account for the monies which were inexplicably missing from D6's account. In this regard, the minutes of a meeting held on 2 October 2015 (IDB (B1) E136 p 96) attended by D2 and D7 on behalf of D6, recorded that as at 1 October 2016, D6 had collected RM8,557,854 from 230 purchasers who have either paid cash or the difference between their loans from LPPSA and the purchase price and who have gone into occupation of their houses.

[55] The collection by D6 of the sum of RM8,557,854 was affirmed by PW5 in her witness statement (Q&A 32 and 33 in PWS5). However, D6's principal Account No 3189063434 in Public Bank Bhd for the project recorded a balance of a mere RM110,000 when the meeting of 2 October 2016 was held (IDB B2 p 38).

[56] Under cross-examination by learned counsel for D4 and D6 on whether the sum of RM8,557,854 collected as at 1 October 2016 has been paid over to the plaintiff, PW5 replied 'No' (NOP p 239 lines 6–9).

[57] D2 testified that only two accounts were used for the purposes of the project ie Sharidan & Co Public Bank Account No 3169273633 and Adzliana & Partners Public Bank Account 3189063434. However, when D2 was asked further whether Adzliana & Partners' Bank Islam account received purchase price under the project, she answered that she was not sure. Such an answer from one who has to account is wholly unacceptable. This shows that D2 was not accounting for the receipt of purchase price as is required of her. On this score, D2 had also contradicted her defence and her earlier testimony that D6 maintained only one bank account ie Public Bank Account 3189063434 when it was shown that D6 has one other Public Bank account and this other account in Bank Islam which D2 was unable or to put it bluntly, has refused to account.

D6 HAVING INSURANCE

[58] That D6 was covered by insurance is not a defence at all. It is for D6 to claim from its insurers. Similarly, that there is no evidence that D2 and D3 have been convicted or charged with any criminal charges and therefore should not be held liable in this civil action, is a self-serving averment which is devoid of merit. In fact, D2 and D3 have not pointed to any law that would exculpate them of any liability premised on these two assertions of theirs. Instead, it is trite that a party can be held liable under civil proceedings without having to be convicted of any criminal charges.

[59] Wherefore, I find that D2 and D3 and by extension D6 are liable to account to the plaintiff for the monies pertaining to the project which they received for the benefit of the plaintiff. On how much they are liable, this will be discussed in detail later on when I come to deal with the relief that is to be awarded to the plaintiff.

AS AGAINST D4 AND D6

Whether judgment can be entered against a law firm

[60] D6 asserts that it is a law firm and thus, has no legal entity in law. That it has completely ceased operations on 22 September 2019, and D6 takes the position that any findings of liability can only be made against an individual defendant, not a law firm. Even if the plaintiff is successful in establishing liability against [all] the defendants, D6 asserts no judgment should be entered against D6, and during the presentation of oral submissions on 15 March 2024, learned counsel for D4 and D6, asserted this would hold true as against D5 as well. D5 did not make such an assertion, and how could it, when its position is that it is a sole proprietorship. However, I do acknowledge that I have held above that D1 is estopped from asserting that it is not a partnership and will now deal with whether a judgment can be entered against a firm.

[61] Reliance was placed by D4 and D6 on the Federal Court authority of *Keow Seng & Company v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 2 MLJ 103 (FC) at pp 104–105 where Raja Azlan Shah LP (later His Majesty) said:

> ... A partnership firm is not a legal entity in law ... The firm name is not in itself the name of any person other than the partners because in the words of Farewell LJ in *Sadler v Whiteman*:
>
> > *... the firm name is a mere expression, not a legal entity ...*
>
> *When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners*

in the name of their firm in truth sues them individually, just as much as if he had set out all their names.

[62] Reference was also made by learned counsel for D4 and D6 to the authorities of *Shahinuddin bin Sharif v Mohd Amin bin Hasbollah* [1998] 3 MLJ 693 (HC) at p 702, and *Hotel Universal Sdn Bhd v Lee Guan Par* [2003] MLJU 722 (HC) at pp 14–16.

[63] I agree that it is trite that a partnership is not a legal entity in law but the law permits for the partnership to be sued in the name of the firm and for a judgment to be entered against the firm. The Partnership Act itself provides so. Section 25(1) of the Partnership Act provides that: 'A writ of execution shall not issue against any partnership property except on a *judgment against the firm*'. And, it cannot be gainsaid that to execute on a judgment against the firm, one must first have a judgment against the firm.

[64] Section 12 of the Partnership Act itself expressly provides that *the firm* is liable to the same extent as the partner who has committed any wrongful act or omission. The provisions are reproduced hereunder:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, *the firm is liable* therefor to the same extent as the partner so acting or omitting to act.

[65] Wherefore, with respect, I agree with the reasoning and decision of His Lordship, Hishamudin Mohd Yunus J (later JCA) in *Southern Empire Development Sdn Bhd v Tetuan Shahinuddin & Ranjit & Ors* who held as follows:

> [12] In my judgment, the liability of the firm/partnership is distinct and different from the liability of the firm's partners. It is true that a partnership, being not a human being but merely an artificial legal entity, on its own can do nothing. Thus on its own it can do no wrong. The partnership acts through its human agency — its partners. Every act or omissions of the partners directly pertaining to the partnership is in law deemed to be an act or an omission of the partnership. But be that as it may, in relation to partnerships, the law recognizes two types of liability:
>
> (1) the liability of the partners; and
>
> (2) the liability of the partnership.
>
> [13] In my opinion, ss 11 and 19 are irrelevant because they are concerned with the liability of partners; whereas the actual issue in the present case concerns the liability of the firm or partnership. In this regard, there is another provision of the Partnership Act that we must turn to — a provision that mentions about the liability of the firm/partnership itself — and that is s 12. This provision reads:
>
> ...

[14] It is, however, true that before any liability can be attributed to a partnership, a wrongful act or wrongful omission (that relates directly to the partnership) must first be committed by a partner.

[15] Yet at the same time it is also pertinent to note that there is nothing in s 12 or, indeed, anywhere else in the Partnership Act that states that the liability of the firm incurred by reason of a wrongdoing of a partner ceases once the errant partner ceases to be a partner of the firm.

[16] In my view, by virtue of s 12 above, the liability of the firm is distinct from the liability of the partners.

[66] That a judgment can be entered against a firm is underscored by the Rules of Court 2012 which provides elaborate rules on how a firm can sue or be sued. A specific set of rules on partnership is prescribed under O 77 of the ROC carrying the sub-title 'Partners' and which provides as follows:

1. Action by and against firms within jurisdiction (O 77 r 1)

Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction *may sue or be sued, in the name of the firm*, if any, of which they were partners at the time when the cause of action accrued.

2. Disclosure of partners' names (O 77 r 2)

(1) Any defendant to an action brought by partners *in the name of a firm* may serve on the plaintiffs or their solicitor a notice requiring them or him forthwith to furnish the defendant with a written statement of the names and places of residence of all the persons who were partners in the firm at the time when the cause of action accrued and if the notice is not complied with the Court may order in Form 190 the plaintiffs or their solicitor to furnish the defendant with such a statement and to verify it on oath or otherwise as may be specified in the order, or may order that further proceedings in the action be stayed on such terms as the Court may direct.

(2) When the names of the partners have been declared in compliance with a notice or an order given or made under paragraph (1), *the proceedings shall continue in the name of the firm* but with the same consequences as would have ensued if the persons whose names have been so declared had been named as plaintiffs in the writ.

(3) Paragraph (1) shall have effect in relation to an action brought against partners in the name of a firm as it has effect in relation to an action brought by partners in the name of a firm but with the substitution, for references to the defendant and the plaintiffs, of references to the plaintiff and the defendants respectively, and with the omission of the words 'or may order' to the end.

3. Service of writ (O 77 r 3)

(1) *Where* in accordance with rule 1 *partners are sued in the name of a firm*, the writ may, except in the case mentioned in paragraph (2), be served —

(a) on any one or more of the partners; or

(b) at the principal place of business of the partnership within the jurisdiction, on any person having at the time of service the control or management of the partnership business there, and where service of the writ is effected in accordance with this paragraph, the writ shall be deemed to have been duly served on the firm, whether or not any member of the firm is out of the jurisdiction.

(2) Where a partnership has, to the knowledge of the plaintiff, been dissolved before an action against the firm is begun, the writ by which the action is begun must be served on every person within the jurisdiction sought to be made liable in the action.

(3) Every person on whom an writ is served under paragraph (1) must at the time of service, be given a written notice in Form 191 stating whether he is served as a partner or as a person having control or management of the partnership business or both as a partner and as such a person, and any person on whom an writ is so served but to whom no such notice is given shall be deemed to be served as a partner.

4. Entry of appearance in an action against firm (O 77 r 4)

(1) Where persons are sued as partners in the name of their firm, appearance may not be entered in the name of the firm but only by the partners thereof in their own names, but *the action shall nevertheless continue in the name of the firm*.

(2) Where in an action against a firm the writ by which the action is begun is served on a person as a partner, that person, if he denies that he was a partner or liable as such at any material time, may enter an appearance in the action and state in the memorandum of appearance that he does so as a person served as a partner in the defendant firm but who denies that he was a partner at any material time. An appearance entered in accordance with this paragraph shall, unless and until it is set aside, be treated as an appearance for the defendant firm.

(3) Where an appearance has been entered for a defendant in accordance with paragraph (2) —

(a) the plaintiff may either apply to the Court to set it aside on the ground that the defendant was a partner or liable as such at a material time or may leave that question to be determined at a later stage of the proceedings;

(b) the defendant may either apply to the Court to set aside the service of the writ on him on the ground that he was not a partner or liable as such at a material time or may at the proper time serve a defence on the plaintiff denying in respect of the plaintiff's claim either his liability as a partner or the liability of the defendant firm or both.

(4) The Court may at any stage of the proceedings in an action in which a defendant has entered an appearance in accordance with paragraph (2), on

the application of the plaintiff or of that defendant order that any question as to the liability of that defendant or as to the liability of the defendant firm be tried in such manner and at such time as the Court directs.

(5) Where in an action against a firm the writ by which the action is begun is served on a person as a person having the control or management of the partnership business, that person may not enter an appearance in the action unless he is a member of the firm sued.

5. Enforcing judgment or order against the firm (O 77 r 5)

(1) *Where a judgment is given or an order is made against a firm*, execution to enforce the judgment or order may, subject to rule 6, issue against any property of the firm within the jurisdiction.

(2) *Where a judgment is given or an order is made against a firm*, execution to enforce the judgment or order may, subject to rule 6 and to the next following paragraph, issue against any person who —

(a) entered an appearance in the action as a partner;

(b) having been served as a partner with the writ, failed to enter an appearance in the action;

(c) admitted in his pleading that he is a partner; or

(d) was adjudged to be a partner.

(3) *Execution to enforce a judgment or an order given or made against a firm* may not issue against a member of the firm who was out of the jurisdiction when the writ was issued unless he —

(a) entered an appearance in the action as a partner;

(b) was served within the jurisdiction with the writ as a partner; or

(c) was, with the leave of the Court given under Order 11, served out of the jurisdiction with the notice of the writ, as a partner, and, except as provided by paragraph (1) and by the foregoing provisions of this paragraph, a judgment or order given or made against a firm shall not render liable, release or otherwise affect a member of the firm who was out of the jurisdiction when the writ was issued.

(4) Where a party who has *obtained a judgment or an order against a firm* claims that a person is liable to satisfy the judgment or order as being a member of the firm, and the foregoing provisions of this rule do not apply in relation to that person, that party may apply to the Court for leave to issue execution against that person, the application to be made by notice of application which must be served personally on that person.

(5) Where the person against whom an application under paragraph (4) is made does not dispute his liability, the Court hearing the application may, subject to paragraph (3), give leave to issue execution against that person and, where that person disputes his liability, the Court may order that the

liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

6. Enforcing judgment or order in action between partners (O 77 r 6*)*

(1) Execution to enforce *a judgment* or an order *given or made in* —

(a) *an action by or against a firm in the name of the firm*, against or by a member of the firm; or

(b) *an action by a firm in the name of the firm against a firm in the name of the firm* where those firms have one or more members in common, shall not be issued except with the leave of the Court.

(2) The Court hearing an application under this rule may give such directions including directions as to the taking of accounts and the making of inquiries as may be just.

7. Attachment of debts owed by firm (O 77 r 7)

(1) *An order may be made under Order 49, rule 1 in relation to debts due or accruing due from a firm* carrying on business within the jurisdiction notwithstanding that one or more members of the firm is resident out of the jurisdiction.

(2) An order to show cause under rule 1 relating to such debts as aforesaid must be served on a member of the firm within the jurisdiction or on some other person having the control or management of the partnership business.

(3) Where an order made under rule 1 requires a firm to appear before the Court, an appearance by a member of the firm shall constitute a sufficient compliance with the order.

8. Actions begun by originating summons (O 77 r 8)

Rules 2 to 7 shall, with the necessary modifications, apply in relation to an action by or against partners in the name of their firm begun by originating summons as they apply in relation to such action begun by writ.

9. Application to person carrying on business in another name (O 77 r 9*)*

An individual carrying on business within the jurisdiction in a name or style other than his own name may be sued in that name or style as if it were the name of a firm, and rules 2 to 8 shall, so far as applicable, apply as if he were a partner and the name in which he carries on business were the name of his firm.

10. Applications for orders charging partner's interest in partnership property (O 77 r 10)

(1) Every application to the Court by a judgment creditor of a partner of an order under section 25 of the Partnership Act 1961 [Act 135] (which authorizes the High Court or a Judge thereof to make certain orders on the application of a judgment creditor of a partner including an order charging the partner's interest in the partnership property) and every application to the Court by a partner of the judgment debtor may in

consequence of the first mentioned application must be made by notice of application.

(2) The Registrar may exercise the powers conferred on a Judge under section 25 of the Partnership Act 1961.

(3) Every notice of application issued by a judgment creditor under this rule and every order made on such notice of application, must be served on the judgment debtor and on such of his partners as are within the jurisdiction.

(4) Every notice of application issued by a partner of a judgment debtor under this rule and every order made on such notice of application, must be served —

(a) on the judgment creditor;

(b) on the judgment debtor; and

(c) on such of the other partners of the judgment debtor who do not join in the application and are within the jurisdiction.

(5) A notice of application or an order served in accordance with this rule on some of the partners of a partnership shall be deemed to have been served on all the partners of that partnership.

[67] For the further following reasons, I am of the considered view that a judgment can be entered against a defendant who is sued in the name of the firm:

(a) the Partnership Act recognises that property of a partnership can be held under the name of a partnership and it is described as partnership property, see ss 22 to 25. It is interesting to see that s 24 provides that 'where land or any interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate';

(b) it is common for bank accounts of a firm to be opened in the name of the firm, just like in this case, where bank accounts of D5 and D6 were opened in their respective names (see the cheque in IDB B1 p 31 of a bank account under the name of (D5) Sharidan & Co office acc, in IDB B50 at p 118 showing a bank-in deposit receipt of monies banked into the account of Sharidan & Co. See also, the cheques in IDB B1 p 115, and IDTP (1) p 39 carrying details of a bank account with the name of Adzliana & Partners clients acc (D6);

(c) execution proceedings by way of garnishee proceedings can be carried out to attach monies standing to the credit of the accounts of opened in the name of a firm who is a judgment debtor, see O 77 r 7 of the ROC and O 49 of the ROC on garnishee proceedings; and

(d) if any issue is taken as to which partner's money is being attached, there are elaborate rules in O 77 rr 2, 5 and 7 for this issue to be dealt with.

Whether D4 who is a salaried partner of D6 is a partner of D6

[68] D4 joined D6 as a salaried partner on 19 January 2017 drawing a monthly salary of RM2,500 equivalent to the market salary of a first-year legal assistant in Seberang Perai Selatan, Penang.

[69] In the main, she asserts that the facts giving rise to the plaintiff's claim arose before she became a salaried partner of D6 and she should not be liable. D4 contends that D2 and D3 were the only partners of D6 who had conduct of the files pertaining to the project with her having no involvement.

[70] She further asserted that by the time she joined D6, the monies said to have been collected by D2 through the law firms of D5 or D6 and yet to be paid over to the plaintiff were no longer in D6's bank account.

[71] However, she concedes that for the period in which she was in D6, a total sum of RM608,519 was received by D6 and a sum of RM330,247.60 was released to the plaintiff in 2017. Therefore, she asserts by way of an alternative argument that, if at all she is to be liable which she denies, her liability should only be for the balance sum of RM278,271.40, and she claims to be fully indemnified by D2 and D3 in the event she is found liable. In this regard, she has taken out a notice pursuant to O 16 r 8 of the Rules of Court 2012 ('the ROC') (encl 239) claiming for such contribution and indemnity. Reliance is placed upon the authorities of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (SC) and *Eastern Shipping Co v Quah Beng Kee* [1924] AC 177 (PC).

[72] I understand D4's assertion of being a salaried partner to mean that she has no share in the equity or profits of the firm and is in fact not a partner, but is held out to be a partner of the firm in name and ought not to be liable. It can be questioned why would a lawyer want to be held out as a partner given the risks involved. The reasons can be many and the following are some of them:

(a) the prestige that comes with the title of being a partner which carries the acknowledgment and notice to the world that this person has reached a level of competence in his profession or is recognised as a valuable asset to the firm;

(b) that he or she would have the power to bind the firm, see s 10 of the Partnership Act which provides that:

> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act

for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

(c) a law firm's strength can be measured by the number of partners it has, and it is common knowledge in the legal fraternity that large institutions, financial or otherwise, are reluctant to empanel law firms which are practicing as a sole proprietorship as part of a risk management policy; or

(d) that in return for being held out as a partner with its accompanying risks, internal arrangements would be made for the other partners to indemnify the salaried partner for any liability incurred by the firm.

[73] However, s 13 of the Partnership Act expressly provides that where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss. And, s 14 of the Partnership Act expressly stipulates that in such an event, every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable.

[74] No distinction is made in the Partnership Act that a salaried partner ought to be treated differently.

[75] D4 was held out as a partner of D6. Section 16 of the Partnership Act expressly provides that every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself, to be represented, as a partner in a particular firm is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

[76] In my considered view, the phrase 'given credit' has to be construed widely to include any transaction carried out with the firm by a party when dealing with one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself, to be represented, as a partner. A trawl through the local law reports did not yield any authority that has decided this issue. Thus, this court's research turned to other Commonwealth jurisdictions namely Australia, Ireland and the United Kingdom where they have similar provisions as our s 16. See s 14 of the Partnership Act 1890 (United

Kingdom) and s 14(1) of the Partnership Act 1892 (NSW).

[77] The following cases from the United Kingdom and Australia held that the phrase 'given credit' was construed expansively to include transactions other than the mere giving of credit. In fact, the facts of the New South Wales case of *Lynch v Stiff* is rather similar to the case at hand against D4:

(a) *Revenue and Customs Comrs v Pal* [2006] EWHC 2016 (Ch) (UK Chancery Division — Patten J):

> 30. *In Nationwide Building Society v Lewis* [1998] Ch 482 *the Court of Appeal did not attempt to decide what was meant by the words in s 14 'has … given credit to the firm' but accepted that they were narrower than the requirement at common law to show that the person seeking to rely on the representation has acted to his detriment as a result of it*. In *Lindley & Banks on Partnership* (18th Ed) para 5–56 the editors state that the words should not be construed in a technical or restrictive sense *but as describing any transaction with the firm*.
>
> 31. The view of the Commissioners as expressed in their Internal Guidance Notes (V 1–28 para 3.4.6) is that the reference to *'giving credit' can be construed as including a holding out for VAT purposes by the completion of form VAT2. There is no direct authority on this point although in an unreported Tribunal decision in Morris v CCE (MAN/76/88) there is a reference to a partner who signed the application form for registration as a partnership but subsequently denied he was a partner having held himself out as a partner. The Tribunal however concluded that there had been an actual partnership and the issue of estoppel did not therefore arise*.
>
> 32. Mr Barlow (for Mr Alonso) disputes the application of either s 141 or the general principles of estoppel by conduct to the Respondents' liability for VAT. The Commissioners, he says, have not 'given credit' to the Respondents and the use of that phrase is indicative of an intention that it should apply only to transactions between the apparent members of a partnership and third parties and not to their tax position. The latter depends on the provisions of VATA 1994 and the regulations. For the Respondents to be liable for VAT on the basis of the current assessment they must actually have been partners in TBC. Section 45 permits the collective registration only if persons are 'carrying on a business in partnership' and does not extend to those merely purporting to carry on business as partners. An incorrect representation or statement in the application for registration that they are partners cannot of itself satisfy the statutory conditions. The remedy for the Commissioners if liability is challenged is to cancel the existing partnership registration and assess those who are actually carrying on the business.
>
> 33. *I agree that the reference to giving credit in s 14(1) however widely interpreted, does not include the registration of the applicants for VAT as partners. It denotes a private law transaction of some kind with the partnership which arises either directly or indirectly out of reliance on the representations made*. I should add that even if it could include dealings with the Commissioners in relation to VAT there is no ' evidence in this case that the Commissioners were in fact

influenced by the inclusion of all four Respondents as partners into not requiring security and permitting returns to be made on a quarterly rather than a monthly basis. The only obvious consequence of the VAT2 form was a registration of the business in the name of TBC.

(b) *Lynch v Stiff* [1943] 68 CLR 429 (HC Australia — full court): The facts in brief were that Lynch was described as a salaried partner but was in fact, an employee of the firm of solicitors. His name appears on the letterhead of the firm together with the principal John Williamson. The respondent had employed the firm for many years in conveyancing business for the purpose of making investment and had always dealt with Lynch. He invested some money with the firm through the firm and in this transaction, he dealt with John Williamson who misappropriated the money. Stiff sued Lynch on the basis that he had been held out as a partner to recoup his loss. It was held by the court of first instance that Lynch was liable. On appeal it was held that:

> In our opinion there is no justification for making any addition to the requirements of the section by holding that the person who has given credit must show that, apart from the holding out, he would not have given credit. The doctrine of holding out is a branch of the law of estoppel. So far as the element of action by the party relying upon an estoppel is concerned, it is sufficient if that party acts to his prejudice upon a representation made with the intention that it should be so acted upon, though it is not proved that in the absence of the representation he would not have so acted.
>
> *In the present case it is proved that Lynch held himself out and suffered himself to be represented as being a partner in a firm of John Williamson and Sons. The heading of the letter paper is conclusive upon this point*. Secondly, it is proved that the respondent gave credit to the 'firm' in that he entrusted the 'firm' with his money for purposes of investment. In the third place there is evidence that he so gave credit because he believed that Lynch, whom he trusted, was a partner.

[78] In this case, no evidence was led to show that notice had been given to the plaintiff that D4 had no authority to act in any particular manner. In the circumstances, with her having been held out to be a partner of D6, she would be liable jointly and severally with the other partners.

[79] This issue was recently canvassed by Quay Chew Soon J in *Azura bt Masri v Perda Ventures Incorporated Sdn Bhd* [2023] MLJU 2554 where His Lordship said:

> The Law on Partnership Liability
>
> [33] As a partner of the Said Law Firm at the material time, *P is jointly and severally liable* towards the Said Law Firm's affairs.

A [34] In this instance, P testified that she had left the affairs of the Said Law Firm to Rohaizat, despite knowing that he was struck off from the rolls due to embezzlement of clients' monies. Having thrown caution to the wind, P cannot now cry foul and attempt to deny D's right to the consent judgment.

B [35] The Court of Appeal in *Toh Fong Cheng & Ors v Pang Choon Kiat & Ors and another appeal* [2020] MLJU 1476 said:

> [136] Section 11 of the Partnership Act 1961 makes all the partners of the firm liable jointly or all debts and obligations of the firm incurred while he is a partner as follows:
>
> C Liability of partners
>
> [11] Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.
>
> D [137] *Neither would the kind of partnership, here that of a salaried partnership of D3, make any difference where liability is concerned*. It is for D3 to get the necessary indemnity from the principal partner Madam FL Foo in the event of being sued; which indeed she had as can be seen at p 472 RR encl 7 in her employment as a salaried partner effective from 3 May 2010. *No amount of arrangements between the partners inter-se whether as salaried, commission or equity partners in charge of separate projects or assignments or branches would affect the world at large that deals with the partnership as a whole*. Here D5 and D6 were said to be partners on the Kuala Lumpur branch of the legal firm whereas D3 and D4 were partners in the Petaling Jaya branch at the material time. *See the case of Southern Empire Development Sdn Bhd v Tetuan Shahinuddin & Ranjit & Ors* [2008] MLJU 60 *in the context of liability of a partnership for a law firm vis a vis liability and the case of Alan Michael Rosario v Merbok MDF Sdn Bhd* [2011] 1 CLJ 433 *where the Court of Appeal held that the allegation that one partner was not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter does not absolve him in law of his liability as a partner of the firm*.

[80] As for the extent of her liability, D4 sought protection by placing H reliance upon s 19(1) of the Partnership Act which provides that:

> A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

I **[81]** Reliance was also placed by D4 on the following authorities for the principle that it has to be shown that D4 was a member of the firm when the cause of action accrued for D4 to be attached with liability:

(a) *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640 (FC) at para [41] where it was held that '... An incoming partner is not liable on

undertakings given before he became a partner (*Butterworth, Corderey on Solicitors* para 945);

(b) *Lee Choon Hei v Public Bank Bhd and another appeal* [2017] 3 MLJ 441; [2017] 7 CLJ 438 (CA) — a partner who had left the partnership was held liable for the wrongful act committed when he was a partner;

(c) *Export-Import Bank of Malaysia Bhd v Hisham Sobri & Kadir (being sued as a firm)* [2018] MLJU 110; [2018] 6 CLJ 82 (HC) — the advice for the drawdown of a loan was given at a time when the new partners were not partners and thus their application to strike out the suit against them were allowed;

(d) *Tham Soon Seong & Anor v Lee Khai (didakwa sebagai seorang individu dan rakan kongsi Tetuan Ong & Manecksha) & Ors* [2021] MLJU 854 (HC) — s 19(1) of the Partnership Act was applied; and

(e) *Guthrie Property Development Holding Bhd v Baharudin bin Hj Ali & Ors* [2011] 3 MLJ 416 (HC) — three defendants who were never partners of the firm during the relevant periods when the stakeholder monies were received by the firm are not liable as partners of the firm because s 19(1) of the Partnership Act 1961 stipulates that a partner who is admitted as a partner into an existing firm does not thereby become liable for anything done before he become a partner.

[82] I am grateful for the supplemental written submissions filed by the learned counsel for the plaintiff (encl 328) and for D4 and D6 (encl 326). These further submissions were filed at the invitation of the court to address the issue of whether the cases of *Oriental Bank Bhd v Nordin Hamid & Ors* [2010] MLJU 1905; [2011] 5 CLJ 237 (CA) and *Tetuan Khana & Co (sued as a firm) v Saling bin Lau Bee Chiang & Ors and other appeals* [2019] 3 MLJ 189 (CA) can be reconciled with the case of *Guthrie Property Development Holding Bhd v Baharudin bin Hj Ali & Ors* [2011] 3 MLJ 416 (HC). This is because the Court of Appeal in *Tetuan Khana & Co* had while agreeing with the principle in *Guthrie Property* that an incoming partner is not liable for debts or obligations of the firm incurred prior to his admission, had nevertheless held that an incoming partner to be liable.

[83] From the in-depth analysis carried out by both the learned counsel for the plaintiff and D4 and D6, in my considered view, both learned counsel are on a common footing that what is critical is to ascertain the facts to determine whether liability is to be cast on an incoming partner.

[84] Much reliance was placed by D4 on the authority of *Guthrie Property Development Holding Bhd* in support of her assertion that by reason of her having been admitted as a partner of D6 only on 19 January 2017, she should

not be made liable for monies to be accounted for the project. In my considered view, such an assertion does not absolve her of liability in whole or in part for the following reasons.

[85] D2 had on behalf of D6 by letter dated 26 October 2017 (IDB B1 p 217) to the plaintiff's new set of solicitors undertaken to forward to the new solicitors, the details of the amount of client's monies held in its account, and how the monies were to be transferred to the account of the new solicitors. This undertaking was given at a time when D4 was a partner of D6 and thus, D4 is liable to make good on the undertaking jointly with the other partners of D6, see ss 10 and 11 of the Partnership Act.

[86] D4 advanced the argument that the undertaking housed in para 4 of this letter of 26 October 2017 is *limited* only to the client's money held in the *firm's account*. Paragraph 4 is set out hereunder:

> For your information, we are still checking the amount of client's monies held in our account. We undertake to forward to you the details and how it will be transfer (sic) to your account before the last date to transfer the files.

[87] To construe the undertaking in this paragraph to be limited to 'client's monies held in the firm's account' with the view to exculpate D4 is unacceptable. In my considered view, D6 through D2 had given an undertaking to account for client's monies, which is the plaintiff's monies, and whichever account, D6 had deposited the monies is irrelevant. This duty to account is one of strict liability and the consequences of a breach of this duty will be visited upon the partners of D6 including D4.

[88] Besides the aforesaid undertaking was given at a time by D6 when D4 was already a partner, I find that the plaintiff has proved on a balance of probabilities the following facts:

(a) even after D4 became a partner on 19 January 2017, D6 was still in the process of completing the conveyancing transactions for the project;

(b) even after 19 January 2017, D6 was still receiving purchase monies from cash purchasers and loans disbursements from BSN, with ten loans being received in 2017;

(c) even after 19 January 2017, D6 still failed to release the purchase price for the nine houses of which conveyancing transactions had been completed in 2016 with titles having been transferred, charges perfected, and loans disbursed;

(d) even after 19 January 2017, D6 still failed to ensure the proper and due submission of loan documentations to BSN for disbursement in relation to another nine houses for which their titles had been transferred and

charges perfected in 2016 but no loans were disbursed by BSN up until the point in time when the appointment of D6 was terminated; and

(e) it is indisputable that even after 19 January 2017 when D4 was admitted as a partner, D6 was still acting for the plaintiff with discussions on foot for the release of purchase price to the plaintiff.

[89] Although the plaintiff was notified by letter dated 27 January 2014 (IDB B1 p 39) under the letterhead of D6 that D5 has handed over the management of all files, finances and administration in its entirety to D6 with effect from 26 June 2013, no detailed accounts were given by D5 and later by D6 of whom D4 was a partner especially on who has paid and for what. These details are facts peculiarly within their knowledge and for which only those working on the project in D5 and D6 would know. And, the partners including those held out as partners and those who have care over the administration of the files such as D7 would have to account. See s 106 of the EA 1950 which provides that:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> ILLUSTRATIONS
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[90] The purchase monies which D5 and D6 held, and received by them on account of the plaintiff, are client's money, see Solicitors' Account Rules 1990. With the client's money going into the accounts of D5 and flowing into the accounts of D6 where more monies accumulated, and with D6 not accounting for these monies, the weight of authorities handed down by the Court of Appeal and in particular *Oriental Bank Bhd* and *Tetuan Khana & Co* of which I am bound to follow, drive me to hold that both the defendant law firms of D5 and D6 including their partners, D1 to D4, have failed to ensure that the plaintiff's rights and interest were protected at all times. They have acted in breach of their contractual duty of care to the plaintiff. They have failed to discharge their professional obligations to account for these monies to the plaintiff, and they are liable *jointly and severally* to account to the plaintiff. See:

(a) *Alan Michael Rozario v Merbok MDF Sdn Bhd* [2011] 1 CLJ 433 (CA) — the partner of the law firm could not escape joint and several liability with his partner even if he was not an equity party of the main branch of the legal firm and had no knowledge of the letter of undertaking which

was given at a time when he was a partner and when there was a breach of the firm's undertaking;

(b) *Oriental Bank Bhd v Nordin Hamid & Ors* [2010] MLJU 1905; [2011] 5 CLJ 237 (CA) at para [40] — 'The legal obligation of the legal firm to make restitution did not cease at the time the fourth respondent joined the legal firm (1 June 1996). So long as the monies were not remitted to the appellant, meaning that so long as the legal obligation to make restitution in respect of the net proceeds was not carried out by the legal firm, that legal obligation persists; and that legal obligation was still continuing at the time the fourth respondent joined the firm on 1 June 1996, and even thereafter. In my judgment, the phrase 'obligations of the firm incurred while he is a partner' in s 11 of the Partnership Act ought to be interpreted to include this continuing obligation. In interpreting s 11, it must be borne in mind that the legal firm benefitted by retaining the appellant's monies. The legal firm was a partnership. The fourth respondent was a partner in that partnership with effect from 1 June 1996. Thus, he too, as a partner of the firm (the partnership), benefitted from the unlawful retention of the monies from the day he joined the partnership. Therefore, it would not be justified if s 11 were to be narrowly interpreted in a manner that would absolve the fourth respondent from the firm's legal obligation to make restitution in respect of those monies';

(c) *Ahmad Hashim v Tetuan Johari, Nasri & Tan* [2012] 9 CLJ 285 (CA) — the partner, Chye Ann Lee, could not arbitrarily say he did not know anything when the compensation money paid for the land acquisition was misappropriated by the firm of which he was one of three partners;

(d) *Venu Nair & Anor v Public Bank Bhd* [2017] 5 MLJ 529 (CA) — majority decision which held that although the appellants claimed that they were innocent partners and not involved in the fraud committed by Frankie Tan, under the provisions of the Partnership Act 1961 ('the Act') any action done, wrongful or otherwise, by any partners would bind the firm and all the other partners. The provisions of ss 7, 8, 12 and 14 of the Act were very clear on this point. Thus, as decided correctly by the trial judge in the main suit, the appellants were liable jointly and severally with Frankie Tan and also their firm; and

(e) *Tetuan Khana & Co (sued as a firm) v Saling bin Lau Bee Chiang & Ors and other appeals* [2019] 3 MLJ 189; [2019] 3 CLJ 1 (CA) at para [117] — para [117] — '... as long as sums which rightfully belong to the Trust Fund are not paid back by the fourth defendant to the plaintiffs, the firm together with its partners including Dinesh are liable for such debts and/or obligations even if Dinesh only joined the firm on 2 January 2004. In our view, from 2 January 2004, Dinesh is liable as a partner for any act or omission which is the legal obligation of the firm for as long as

such obligation has not been discharged'.

Limitation — D2, D3, D4, D6 and D7

[91] The defence of limitation was not raised by D1 and D5. It was, however, raised by D2, D3, D4, D6 and D7 (see IP para 29 of their joint defence E118 p 76). They assert that the plaintiff's action did not accrue within six years from the date of the filing of this action, and is barred by limitation pursuant to s 6 of the Limitation Act 1953. However, in their submissions, it was not canvassed leading to the inference that it has been abandoned. Nevertheless, for the sake of completeness, I will deal with the same.

[92] This action was filed on 9 July 2018 which is only 34 months after the meeting held on 2 October 2015 (IDB (B1) E136 p 96) attended by D2 and D7 on behalf of D6, where information about the amounts collected as at 1 October 2016 were given, and less than one year after the defendants have failed to make good on the undertaking given vide D6's letter of 26 October 2017.

[93] This action is grounded not only for breach of trust and contract but also on the tort of negligence. It has recently been made clear by the Federal Court in *Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor* [2024] 3 MLJ 544 (FC) at para [68], that the time period for a tortious claim premised on negligence runs from the date of *actual damage* and not some contingent damage. With the defendants having breached their duty of care to account for the monies received by them and with actual damage having clearly crystallised only upon breach D6's undertaking in late October 2017, the filing of the plaintiff's suit in July 2018 is clearly within the time limited for filing an action and hence this defence is clearly without merits.

[94] In my considered view, in any event, just as was held in *Tetuan Khana & Co (sued as a firm) v Saling bin Lau Bee Chiang & Ors and other appeals* [2019] 3 MLJ 189; [2019] 3 CLJ 1 (CA), so long as these monies are not fully accounted to the plaintiff, it is a case of a continuing cause of action involving a running account of the subject monies and no period of limitation applies, see s 22(1) of the Limitation Act.

D4 having no dealings with the project

[95] D4 led evidence that she had never dealt with the plaintiff and had no dealings whatsoever with the files relating to the project as determined by D2.

[96] In D4's written submissions (E301 para 30) it was asserted that the plaintiff's police report shows that D4 'was involved' in the files pertaining to

the project. In my view, this is an obvious typographical error because this assertion was preceded by a sentence asserting that there was 'no mention' of D4's name throughout the said police report dated 26 July 2017. And, it was further asserted that D4 was not called up by the police for investigation and no criminal charge has been pressed against her. Whilst I accept that this is an obvious typographical error, it behooves all counsel to be careful with their presentation lest an inadvertence lead to the finding of an admission to the prejudice of their clients.

[97] However, as mentioned, with D4 being held out as a partner of D6, and there being no notice given to the plaintiff that D4 is in fact not a partner, her assertion that she had no dealings with the plaintiff is irrelevant. Instead, at the risk of repetition, ss 7, 8, 12,13 and 14 of the Partnership Act applies to her as to cast joint and several liability upon her.

[98] In fact, D4 in her amended defence (at p 139 para 14), inter alia, expressly admitted that D6 has the express and/or implied duty to fulfil all its professional obligations to the plaintiff!

As against D7

Whether D7 a partner of D6

[99] In D6's firm profile (IDB B1 pp 42–62 @ p 44 and 46) under the caption of 'Partners' besides the names of D2 and D3, there is the name of D7. Clearly, D7 is being held out as a partner of D6.

[100] In this printed profile, he is held out to have graduated with honest (sic) in Diploma in Bussiness (sic) Administration from Kolej Teknologi Perak. Although, there is no mention that he has a law degree, it cannot be denied that he was ostensibly held out to all and sundry that he is a partner of D6. His forte was described as:

> As a senior person and having lots of marketing experience he is now in charge in (sic) marketing of conveyancing matter with the Developers and Banks.

[101] D7 is the husband of D2. Under cross-examination, when challenged with this printed profile, D2 admitted that D7 was held out as a partner of D6. When pressed further on whether D7 knows that he is represented as a partner, she replied (NOP p 352 lines 3–25):

> Dia tahu

[102] To underscore that he was held out as a partner of D6, it can be seen that despite it being indisputable that he was never an advocate and solicitor, he had

the audacity to be joined as a co-plaintiff together with D2 and D3 in Suit 665 to sue the plaintiff for inter alia legal fees for handling the project. In Suit 665, D7 pleaded that *he was a former member of the partnership of D6*. In its original language D7 pleaded that he was suing in his capacity as:

> bekas anggota perkongsian Tetuan Adzliana & Partners yang menyaman individu-individu yang terkesan.

[103] It is settled law that save for certain exceptions which does not apply to D7 (see s 38 of the Legal Profession Act 1976) a person must be an advocate and solicitor with a valid practising certificate authorising him to do so, before he can practice, see s 36 of the same Act. See also *Darshan Singh Khaira v Majlis Peguam Malaysia* [2021] 5 MLJ 921; [2021] 10 CLJ 497 (FC).

[104] However, with D7 having expressly pleaded and holding himself out as a partner in Suit 665, and knowingly allowed himself to be held out as a partner by D2 and the law firm of D6, in my considered view D7 is liable as a partner of D6. I also find that by reason of these facts, D7 is also estopped from denying that he was a partner of D6, see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad*.

[105] I agree with the observation made by learned counsel for the plaintiff (E312 paras 11 and 12) and from my own personal observation made pursuant to s 73(1) of the Evidence Act 1950, the signature on the cheque of Sharidan & Co's Public Bank Account No 3169273633 (office account) (IDB B1 p 31) is similar with the signature on D7's witness statement (DWS5) (encl 275). This leads to the inference that he was an authorised signatory of D6's bank account. It further fortifies the fact that D7 has not only been consistently held out as a partner in both D5 and D6 but had in fact conducted himself as one.

[106] From the evidence led, it is proved that D7 was the office and marketing manager in both D5 and D6. He brought the project to these two firms for which he received a share of the profit and commissions. He managed the project, gave advice to the plaintiff and attended almost all the meetings with the plaintiff on the project and even on occasions without with the presence of lawyers, and that the plaintiff had treated him as if he is a partner of D6. These pieces of evidence were elicited by way of cross-examination of D7 himself as well as D2 and D4, and from the evidence given by PW5.

[107] See *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73 where the Federal Court held that:

> [29] The class of fiduciary relationships is never closed (*English v Dedham Vale Properties Ltd* [1978] 1 All ER 398, per Slade J). As can be seen from the English

cases, the English judges have never attempted to formulate a comprehensive definition of who is a fiduciary. Certain relationships are well known to be fiduciary. In *Snell's Equity* (32nd Ed) (2010) Thomson Reuters at pp 172 to 178, the learned author stated that the accepted categories in which the courts presume the existence of a fiduciary relationship are as follows:

(a) director vis a vis their companies;

(b) solicitor-client relationships;

(c) agent-principal relationship; and

(d) partnerships.

[30] Notwithstanding that there are authorities to say that fiduciary duties may be owed where the circumstances justify the imposition of such duties. In this connection the learned author of *Snell's Equity* stated at pp 175 and 176 as follows:

(c) Ad hoc fiduciary relationships

(1) PRINCIPLES. The categories of fiduciary relationship are not closed. Fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. Identifying the kind of circumstances that justify the imposition of fiduciary duties is difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship, preferring to preserve flexibility in the concept. Numerous academic commentators have offered suggestions, but none has garnered universal support. Thus, it has been said that the 'fiduciary relationship is a concept in search of a principle'. There is, however, growing judicial support for the view that:

> a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

WAIVER AND ILLEGALITY

[108] Before concluding on the issue of liability, I will deal with the first two of three alternative arguments postulated by D4 and D6 which is that of waiver and illegality.

[109] On waiver, D4 and D6 asserts that under the sale and purchase agreements, the purchase monies were to be released to the vendor who is the plaintiff. However, three cheques totaling RM901,826 were issued, one in the name of 'CEO FELCRA' and two in the name of 'Ketua Pegawai Eksekutif FELCRA Berhad' instead of the plaintiff. Therefore, D4 and D6 contends that the plaintiff had waived its right to claim in contract and tort the purchase monies allegedly received by D5 before 10 May 2013, which is the date of the third cheque when it instructed for payment to be made to a third party.

However, I find such an assertion to be devoid of merits because these three payments were made on the instructions of the plaintiff, and credit for these payments were given to the defendants.

[110] The other ground relied upon by D4 is that the plaintiff's claim is for payment of monies collected on a progressive basis as per the sale and purchase agreement predicated on stages of construction and delivery of possession. However, the plaintiff had later instructed that the balance purchase price is to be collected only upon the completion of the process of transfer. Reliance was made to the letter dated 20 December 2014 from the plaintiff to D6 (IDTB (1) pp 2–4 @ p 3).

[111] However, the project has been completed and the properties sold duly transferred to the purchasers with possession given to the purchasers by 2014. This fact was admitted by D4 and D6 in their amended defence (para 16). The thrust of the claim is for the purchase monies collected by D5 and D6 and it is indisputable that by the time this action was commenced on 9 July 2018, all the monies received and which ought to be received have to be accounted and paid over to the plaintiff.

[112] Thus, I find the first alternative argument of D4 and D6 grounded on waiver to be devoid of merits.

[113] In their written submissions, the second alternative argument advanced by D4 and D6 is that the claim of the plaintiff is tainted with illegality and that the plaintiff has not come to court with clean hands. Reliance was placed upon the evidence elicited from D7 during the course of his testimony. D7 said that the plaintiff was not the owner of the land at the material time and was not a licensed housing developer. However, this issue of illegality was *not pleaded* in the amended defence of D4 and D6. What was pleaded in support of their illegality defence was that similar to that relied upon for their first alternative argument on waiver ie that one payment was made to the CEO FELCRA and two payments made to *Ketua Pegawai Eksekutif* FELCRA. With these payments having been authorised and in any event ratified by the plaintiff, I find that there is no taint of illegality and the pleaded defence on illegality grounded on this, is devoid of merits. In fact, D4 and D6 had in their written submissions abandoned this line of defence and instead sought to rely upon the testimony of D7 to advance their second alternative argument.

[114] Ex facie, the sale and purchase agreements entered into by the plaintiff with the purchasers were not illegal. To the contrary, from the evidence led, the houses were constructed and completed. The titles to these houses were transferred and vacant possession delivered to the purchasers. Therefore, the

second alternative argument mounted by D4 and D6 which were not pleaded, ought not to be considered, see:

(a) *Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd* [2015] 6 725; [2015] 9 CLJ 677 (FC) where the Federal Court held that a court might act on ex facie illegality in the absence of a plea. But other than ex facie illegality, any radical departure from the pleaded case must be pleaded to avoid surprise at the trial; and

(b) *Kunci Semangat Sdn Bhd v Thomas Varkki a/l MV Varkki & Anor* [2022] 3 MLJ 857; [2022] CLJU 424; [2022] 1 LNS 424 (CA) (Nantha Balan JCA):

> [99] In the present context, if illegality had been pleaded, then the plaintiffs would have had to rebut or repudiate the defendant's allegation that they were engaged in 'estate agency practice'. Thus, since the issue was not pleaded in the defence and not raised during the trial, but only raised during post-trial written submissions, the plaintiffs were deprived of the opportunity of neutralising the allegation that they were engaged in estate agency practice. Indeed, the allegation of illegality seems to be an 'afterthought' and in any event, amounts to 'trial by ambush' which is a key building block for miscarriage of justice.

[115] It goes without saying that the authorities cited by D4 and D6 in support of their unpleaded plea of illegality are irrelevant. Order 18 r 8(1) of the ROC expressly provides that 'a party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality — (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or (c) which raises issues of fact not arising out of the preceding pleading'.

[116] Further, I agree with the plaintiff that the Federal Court had in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60 (TAB-41 PBOA-3) held that although developers or solicitors or anyone may have committed an offence under the Housing Developers (Control and Licensing) Act 1966 ('the HDA'), it did not render the sale and purchase agreements illegal as they were based on statutory contracts, which were not forbidden by law or of such nature that they would defeat any law because they were themselves prescribed by law. It was not the agreements per se that were illegal, but it was their performance which had violated the strict terms of the HDA, the regulations and the Schedules. And, when it concerned social legislation made for the benefit of the purchasers, the court will not void the agreements automatically but voidable at the instance of the beneficiaries of the social legislation, the purchasers. In the instant case,

none of the purchasers have stepped forward to do so.

[117] I find that beyond a bare averment made by D7 that the HDA applies to the plaintiff, no evidence was led to show whether the plaintiff was in fact and in law building the project within the meaning of the HDA. As pointed out by the plaintiff, it is not merely an ordinary company seeking profits for its development but one wholly owned by the Ministry of Finance Incorporated (MOF Inc) and established for the purposes of looking after the welfare of their settlers who are the purchasers of the houses built in the project. See *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914; [2021] 2 CLJ 318 (FC), where the Federal Court at para 54 said:

> [54] The relevant statute complained of must be carefully examined, its purpose or object determined, before the court can conclude one way or another if the contract, act or deed in question is invalidated by such contravention.
>
> ...
>
> [101] That one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without: (a) considering the underlying purpose of the prohibition which has been transgressed; (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim: and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations (laid down by the Supreme Court of UK in *Patel v Mirza* [2017] 1 All ER 191) can be found in the case law.
>
> ...
>
> [109] The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted.

[118] To allow D4 and D6 to take advantage of such an illegality plea as advanced in their second alternative argument, would in my considered view, be wholly disproportionate to the breaches of their duty of trust and confidence which they owe the plaintiff. And that public interest in preserving the integrity of the justice system should not result in the denial of the relief claimed by the plaintiff.

D4's third alternative argument

[119] D4 posited that, if liability is held against her, she should only answer for monies received after she joined D6 on 19 January 2017. From the evidence led, D4 asserted that a total of RM608,519 was received by D6 after 19 January 2017 and with a sum of RM330,247.60 having been released via D6's Public Bank Bhd Cheque No 353393 dated 14 March 2017, she asserted her liability ought to be only for RM278,271.40 (RM608,519 less RM330,247.60).

[120] The answer in the negative to this argument can be found in s 13 of the Partnership Act, and the Court of Appeal authorities of *Oriental Bank Bhd* and *Tetuan Khana & Co* which held that so long as there is a continuing obligation to compensate for all losses incurred as result of the firm's refusal or failure to account, such an obligation does not cease to exist by virtue of the incoming or outgoing of an individual partner and the firm together with its partners including the incoming partner are liable for such debt or obligations, see *Tetuan Khana & Co* at paras [107], [115] to [117].

[121] Learned counsel for D4 highlighted that s 19(1) of the Partnership Act was not considered by the Court of Appeal in *Oriental Bank Bhd* and impliedly suggests that the decision of *Oriental Bank Bhd* was made per incuriam. With respect, a similar argument was raised and was expressly rejected by the Court of Appeal in *Tetuan Khana & Co* and Her Ladyship, Yeoh Wee Siam JCA speaking for the Court of Appeal held as follows:

> [113] We are in agreement with the principles set out in the authorities cited by learned counsel for Dinesh. *However, we do not agree with his submission that the decision in Oriental Bank was decided per incuriam because the Court of Appeal in that case appears to suggest that in certain circumstances, an incoming partner can be liable for an existing debt of a partnership firm, and the Court of Appeal made no reference whatsoever to s 19(1) of the PA in coming to its decision.*
>
> [114] Learned counsel for Dinesh further submitted that in our present case, the firm had already received the sum of RM16,554,111.92 and such sum had already been disbursed in full, well before Dinesh joined the firm as a partner. There was therefore no question of Dinesh having benefited from the monies as was the case in *Oriental Bank*.
>
> [115] *With respect, we do not think that the Court of Appeal had decided Oriental Bank per incuriam*. The facts of that case are such that there clearly arose a continuing obligation of the partner as spelt out by the court in that case. In our opinion, in the present case, the learned judge did not err in deciding that there is a continuing obligation by the fourth defendant to compensate the plaintiffs for all losses incurred as a result of the firm's refusal and/or failure to account for the RM16,554,111.92. *We agree with the submissions of the plaintiffs that the failure by the firm to account for sums received on behalf of its client in its accounts does not cease to exist by virtue of the incoming or outgoing of an individual.*

[122] Learned counsel for D4 next turned to authorities in other jurisdictions with similar provisions as that of s 19(1) of the Partnership Act. These

jurisdictions are England — s 17(1) of the English Partnership Act 1890; New Zealand — s 20(1) of the New Zealand Partnership Act 1908; and India — s 31(2) of the India Partnership Act 1932. Several authorities were cited from these jurisdiction to assert that an incoming partner like D4 ought not to be liable. However, as was pointed out by learned counsel for the plaintiff, the position in India was in fact considered by the Court of Appeal in *Tetuan Khana & Co* (see para [112] of the Court of Appeal grounds of judgment) before the decision was made holding the incoming partner liable.

[123] Bound by the doctrine of stare decisis or precedent, I am obliged to follow and apply the law as laid down in *Oriental Bank Bhd* and *Tetuan Khana & Co*. See *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 where the Federal Court speaking through His Lordship, Arifin Zakaria CJ said:

> [29] We are a country governed by the rule of law and thus finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment ...
>
> [50] A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. A precedent or authority is a legal case establishing a principle or rule that a court or other judicial body adopts when deciding in subsequent cases with similar issues or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country. The doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision-making formed by case law. *Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short, the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the setup precedents established by prior decisions. This legal principle is called stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of stare decisis, ie. to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

[124] D4 then sought to distinguish the facts in *Oriental Bank Bhd* and in *Tetuan Khana & Co* on the grounds that in the former, the incoming partner benefited from the monies retained, whereas in the latter, the incoming partner has a familial relationship with the existing partner, he being the son of the existing partner and who was personally involved in the administration of the trust fund. D4 proceeded to assert that by the time, she joined D6, the monies were no longer in D6's account and it is 'utterly unfair' for D4 to be personally liable. However, premised on the facts I have found as against D4 and set out

in paras 85 to 90 above, which I shall not repeat here, the circumstances that obtain in this case are such that I am bound to find D4 liable premised upon the Court of Appeal authorities of *Oriental Bank Bhd* and *Tetuan Khana & Co*.

[125] It follows that the liability of D4 has to be to the same extent as that of D6.

[126] Learned counsel for D4 asserts that to find liability against D4 would be a huge disincentive for anyone to be a partner. However, that is a matter to be taken in another forum and not here. There is for eg the Limited Liability Partnerships Act 2012 Act 743 and this court is given to understand that there are ongoing efforts to have the Legal Profession Act 1976 amended to allow members of the legal profession in Malaysia to practice under the vehicle of a limited partnership. As it is, this court is to apply the law as it understands it to be on the facts as found, and it behooves any party to carry out a due diligence on the firm he or she is going to form or join as a partner or be held out as a partner, and weigh the risks he or she is willing to undertake as against the prospective rewards.

FINDINGS ON LIABILITY

[127] Wherefore, in summary, I find that all the defendants are liable jointly and severally to account to the plaintiff for the monies which have been proven to have been received. Save for D1 and D5, they are also jointly and severally liable for monies which ought to have been received by them from BSN in the sum of RM1,225,682 for the 15 units of houses where D6 attended to having the titles transferred to the purchasers and charged to BSN but did not proceed to have the loans disbursed.

Reliefs to be awarded

[128] Evidence had been led by way of letters, receipts and proof of payments through PW5 and set out in her witness statement (PWS5). I find that the losses that the plaintiff was able to prove on a balance of probabilities are that tabulated by the plaintiff and reproduced below:

Description	Amount (RM)
Purchase price paid by 96 cash purchasers	6,075,806.70
19 loans disbursed by BSN	1,346,324
Differential price for the 19 units	185,714
15 units which titles had been transferred and charged but no BSN loan was disbursed	1,225,682

Description	Amount (RM)
Deposit and differential price paid by 132 BSN purchasers	1,182,710.84
+ Booking fees and deposit paid by 72 LPPSA purchasers	50,536.20
Total losses	10,066,773.74
(Minus)	
3 Payments by Sharidan & Co (D5)	(901,826)
– 3 Payments by Adzliana & Partners (D6)	(781,396.20)
Total received	(1,683,222.20)
Losses of the Plaintiff	RM8,383,551.54

General damages

[129] Although this head of claim was pleaded in its statement of claim, no submissions on the same were put forward by the plaintiff and is deemed to be abandoned. In my opinion, the plaintiff is content to claim only for the specific or special damages to the total sum of RM8,383,551.54.

Aggravated and or exemplary damages

[130] The plaintiff claims for aggravated and exemplary damages. Reliance was placed on the case authority of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 (TAB-31), where the Court of Appeal held as follows:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.
>
> [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v Barnard* [1964] 1 All ER 367; *AB and others v South West Water Services Ltd* [1993] 1 All ER 609; *Broome v Cassell & Co Ltd* [1971] 2 QB 354, *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675).

[131] The plaintiff pointed out that there has been utter failure by the defendants to account, that they have withheld and concealed the true situation on what has happened to the funds, the status of the BSN loans, had misapplied the purchase price collected on the plaintiff's behalf and:

(a) D6 gave a false undertaking to the plaintiff's new solicitors to transfer the purchase price when there was only about RM100 in its account;

(b) D6 refused to transfer the remaining files to the plaintiff's new solicitors despite having been terminated and despite D6 having given an undertaking that D6 will do so;

(c) the giving of testimony which is at odds with the documents and with each other; and

(d) the continued collection of monies under the name of D5 and with D5 continuing to operate its bank accounts under the name of D5 when it ought to have been closed down on 1 January 2013.

[132] In my considered view, this is a case where trust and confidence were reposed upon members of an honourable profession and were abused. It is an abysmal state of affairs. From the failure, nay, in fact refusal by the D1, D2 and D3 and by extension D5 and D6 as well as D7 who played a big role in the management of the files with him being made a signatory of one of D6's accounts, to account for the monies collected and which ought to be collected after having the plaintiff's properties transferred to the purchasers, and forcing the plaintiff to have to piece together the evidence with the aid of the Bar Council and the police, and to sue for the same, only to have D1, D2, D3, D5, D6 and D7 thumbing their noses at the plaintiff by denying the claim and seeking strict proof when they are the ones who ought to account, aggravates the harm and hurt caused to the plaintiff.

[133] His Lordship, Tee Geok Hock J in *Chang Sean Pong Eddie & Anor v TVS SCS Malaysia Sdn Bhd (formerly known as Pan Asia Logistics Malaysia Sdn Bhd)* [2023] 12 MLJ 308; [2023] 9 CLJ 232 said the following on the issue of a corporate body claiming for aggravated damages:

> [44] In exceptional circumstances, aggravated damages may be awarded in a case of serious and deliberate breach of contract with the intention that the wrongdoer's profits to be derived from the breach would far exceed the plaintiff's special damages. Exemplary damages are only awarded in two categories of exceptional cases: see the decision of the Federal Court in *Hassan binMarsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141; [2018] 7 CLJ 403, the Federal Court referred to the case of *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39. However, the nature and character of the present case here do not fall within those two exceptional categories.

[45] In our present case, the trial judge did not find any exceptional circumstance and also did not award any aggravated damages. What the trial judge awarded was general damages of RM40,000 over and above the special damages which was proven and awarded.

[46] In the respondent's submission, the Court of Appeal's decision in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] CLJU 500; [2017] 1 LNS 500 was cited to support the sessions court judge's award of RM40,000 as general damages here.

[47] In the considered view of this court, the material facts in the Court of Appeal's decision in *Sambaga Valli v Datuk Bandar Kuala Lumpur & Ors* can be distinguished from the facts of our present case on the following grounds:

(i) *Sambaga Valli* case relates to a wrongful demolition of business premises and seizure of trading goods by a local authority, and not a breach of contract between two private entities;

(ii) in *Sambaga Valli*, the plaintiff was an individual person, whereas the plaintiff in our present appeal is a limited company; and

(iii) in *Sambaga Valli*, the Court of Appeal awarded RM55,000 for mental stress and trauma suffered by the individual plaintiff and her family due to the wrongful raid and seizure by a local authority resulting in closure of her business; *here in our appeal, there is no question of a corporate plaintiff suffering mental stress and trauma*.

[134] Similarly here in this action, the plaintiff is a corporate body and a claim for aggravated damages would not be appropriate. However, in my considered view, the conduct of all the defendants, save for D4, amounts to a deliberate breach of contract and trust and confidence for which an award of exemplary damages would be appropriate.

[135] In my considered view, the failure of D6 to ensure that the loan amount of RM1,225,682 for the 15 units are disbursed when the properties were transferred to the purchasers and charged to BSN is one of negligence. From the evidence led (see PWS5 Q&A 73 and Attachment A), these 15 units were charged over a period of time from 20 October 2016 until 8 May 2017. D4 was admitted as a partner as from 19 January 2017 and therefore, will be jointly liable with the other partners of D5. However, D1 and D5 were no longer involved in the project and by reason thereto ought not to be held accountable for negligence in failing to ensure that the loans are disbursed and collected by D6.

[136] Even if the amount of RM1,225,682 is not taken into account, there is still a huge sum of RM7,157,869.54 (RM8,383,551.54 less RM1,225,682) which is unaccounted for. The logical inference to be drawn is that this sum have been misapplied by the defendants save for D4. This falls into the second category of cases where exemplary damages can be awarded as decided by the

House of Lords in *Rookes v Barnard and others* [1964] AC 1129 at pp 1226–1227 where it was held as follows:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to theplaintiff This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object — perhaps some property which he covets — which either he could not obtain at all or not obtain except at a price greater than he wants put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

[137] Edgar Joseph Jnr FCJ speaking for the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 (FC) said that:

> Punitive or exemplary damages might be awarded where a breach of contract was also a tort, but in English law they are not awarded for a mere breach of contract (*Perera v Vandiyar* [1953] 1 WLR 672)

[138] His Lordship Daryl Goon J (later JCA) in *Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors* [2020] 10 MLJ 791; [2020] 5 CLJ 426 (HC) said:

> [58] It is clear that the quantum of exemplary damages to be awarded must be principled and proportionate — the primary objective being to punish and to deter the wrongdoers (see *Ramzan v Brookwide Ltd* [2012] 1 All ER 903*; AXA Insurance UK PLC v Financial Claims Solutions Limited* [2018] EWCA Civ 1330 (CA)). This is of course unlike compensatory damages.

[139] In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 ; [1994] 1 CLJ 19 (HC) His Lordship, Edgar Joseph Jnr SCJ awarded exemplary damages pegged to slightly above 25% of the compensatory damages awarded. His Lordship had pointed out that in *Rookes v Barnard*, Lord Devlin has said as follows:

> In addition Lord Devlin went further and spelt out three 'considerations' applicable to all cases of exemplary damages:
>
> first, that the plaintiff cannot recover such damages unless he is himself the victim of such 'punishable behaviour'. Secondly, 'exemplary' damages can be used both for and against liberty, and are a punishment without the safeguard of the criminal law, so that the weapon must be used with restraint, and the house might have 'to place some arbitrary limit on such awards' despite the respect due to assessment of damages by juries. *Thirdly, the financial means of the parties, though irrelevant to compensatory damages are relevant to exemplary damages*.

[140] The instant case is not a mere breach of contract. There is the added elements of breach of trust and confidence reposed upon the defendants and the plaintiff having in truth and substance been defrauded of the monies due to

it. These are torts, and an award of exemplary damages is called for, to teach the perpetrators that tort does not pay, and I award a sum equivalent to ten per cent of the sum of RM7,157,869.54 which amounts to RM715,787 (rounded up to the nearest ringgit).

[141] In the case of D4, although by operation of law she is liable together with the partners of D6, I find that she is not personally culpable for the breach of trust and confidence. This is premised upon the evidence led that she has no control over the accounts of D6 and was not personally involved in the project. By reason thereto, I find that exemplary damages is not to be visited upon her.

[142] It is apt, that in this case, costs on an indemnity basis be awarded in favour of the plaintiff who had placed trust and confidence upon the members of the legal profession only to be have it abused. In the case of D7, he had placed himself in a fiduciary relationship with the plaintiff and had held himself and allowed himself to be held out as a partner of a law firm, and therefore similarly I find that an award of costs on an indemnity basis against him would be appropriate in the circumstances of this case.

[143] If it is asserted that the standard placed upon members of the Bar is too high, I make no apology, as this is the standard expected of any member of the profession which is an honourable profession. So high is the standard expected, that the Rules of Court 2012 expressly provides that solicitors can (also) be made personally liable for costs incurred improperly, or without reasonable cause or are wasted by undue delay or by any other misconduct or default, see O 59 r 6(1) of the Rules of Court 2012.

D4 and D6 claim for contribution and indemnity against D2 and D3

[144] By notice pursuant to O 16 r 8 of the ROC, D4 and D6 claimed to be fully indemnified by D2 and D3 for the claims made by the plaintiff in this action, if she is found liable. However, in their submissions (encl 301 Part F paras 92–95), I observed that D6 has dropped such a claim leaving only D4 to continue with her claim against D2 and D3. Reliance was placed upon the authorities of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (SC) at p 228 D-F and *Eastern Shipping Co v Quah Beng Kee* [1924] AC 177 (PC) at pp 83–84.

[145] Both D2 and D3 did not contest such a claim by D4 for contribution and indemnity.

[146] Subject to what has been determined by this court on the claim by the plaintiff as against all the defendants including D4, I agree that premised upon the following facts as asserted by D4 as against D2 and D3, and which were not

denied by D2 and D3, D4 is to be fully indemnified by D2 and D3 fully against the judgment which the court pronounces in favour of the plaintiff against all the defendants. The facts are:

(a) D4 was held out to be a partner by D2 and D3;

(b) D2 and D3 were the only partners in D6 who had conduct of the files pertaining to the project;

(c) D4 had no involvement and did not carry out any work in respect of the files pertaining to the project;

(d) D4 had no knowledge of the files, documents and/or matters pertaining to the project; and

(e) D4's knowledge was confined and/or limited to the extent that the partners having conduct of the files pertaining to the project were D2 and D3.

CONCLUSION

[147] Wherefore, judgment is granted in favour of the plaintiff as follows:

(i) as against all the defendants who are liable to pay to the plaintiff on a joint and several basis the following:

(a) the sum of RM7,157,869.54;

(b) interest thereon at 5%pa from the date of the filing of the writ which is 9 July 2018 until one day before the date of judgment; and

(c) interest on the judgment debt comprising (i)(a) and (b) above from the date of judgment until full satisfaction.

(ii) as against defendants 2, 3, 4, 6 and 7 who are liable to pay to the plaintiff on a joint and several basis the following:

(a) a further sum of RM 1,225,682;

(b) interest thereon at 5%pa from the date of the filing of the writ which is 9 July 2018 until one day before the date of judgment; and

(c) interest on the judgment debt comprising (ii)(a) and (b) above from the date of judgment until full satisfaction.

(iii) as against defendants, 1, 2, 3, 5, 6 and 7 who are liable to pay the plaintiff on a joint and several basis the following:

(a) exemplary damages of RM715,787;

(b) interest thereon at 5%pa from the date of the filing of the writ

which is 9 July 2018 until one day before the date of judgment; and

(c) interest on the judgment debt comprising (iii)(a) and (b) above from the date of judgment until full satisfaction.

(iv) costs is awarded in favour of the plaintiff against all the defendants on an indemnity basis which is to be assessed by the Registrar.

[148] As for the claim for contribution and indemnity by D4 against D2 and D3, judgment is entered in favour of D4 to be fully indemnified by D2 and D3 against the judgment that is entered in favour of the plaintiff against D4 with costs on an indemnity basis which is similarly to be assessed by the Registrar.

[149] I end by thanking learned counsel for all the parties, and in particular, learned counsel for the plaintiff and D4 and D6 for the comprehensive submissions they have put up which have greatly assisted me in arriving at my decision. No discourtesy is meant for not citing the other large number of authorities that have been cited by the respective counsel for the parties, but given the reasons I have put up in these grounds, with respect, they would only unduly add to the length of this lengthy judgment put up to address the various arguments raised by way of defence.

Order accordingly.

Reported by Ashok Kumar